

thereof.”<sup>1109</sup>

359. In the *Second BellSouth Louisiana Order*, the Commission found that a BOC satisfies the requirements of checklist item 8 by demonstrating that it: (1) provided nondiscriminatory appearance and integration of white page directory listings to competitive LECs’ customers; and (2) provided white page listings for competitors’ customers with the same accuracy and reliability that it provides its own customers.<sup>1110</sup>

## 2. Discussion

360. Based on the evidence in the record, we find that Bell Atlantic satisfies the requirements of checklist item 8.<sup>1111</sup> Bell Atlantic demonstrates that it is providing white pages directory listings for customers of competitive LECs that are nondiscriminatory in appearance and integration,<sup>1112</sup> and have the same accuracy and reliability that Bell Atlantic provides for its own customers.<sup>1113</sup> The New York Commission concludes that Bell Atlantic complies with this checklist item.<sup>1114</sup>

361. We are not persuaded by AT&T and Choice One’s assertions that Bell Atlantic fails to provide white pages directory listings in a nondiscriminatory manner.<sup>1115</sup> Although AT&T claims that Bell Atlantic’s OSS consistently drop directory listing orders associated with UNE loop orders,<sup>1116</sup> AT&T provides no evidence of problems with the white pages directory listings

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<sup>1109</sup> *Id.* at 20748. We note that in the *Second BellSouth Louisiana Order*, we stated that the definition of “directory listing” was synonymous with the definition of “subscriber list information.” *Id.* at 20747 (citing the *Local Competition Second Report and Order*, 11 FCC Rcd at 19458-59). However, the Commission’s decision in a recent proceeding obviates this comparison, and supports the definition of directory listing delineated above. See *Implementation of the Telecommunications Carriers’ Use of Customer Proprietary Network Information and Other Customer Information*, CC Docket No. 96-115, Third Report and Order; *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Second Order on Reconsideration; *Provision of Directory Listing Information under the Telecommunications Act of 1934, as amended*, CC Docket No. 99-273, FCC 99-227, Notice of Proposed Rulemaking, para. 160 (rel. Sept. 9, 1999).

<sup>1110</sup> *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20747-48.

<sup>1111</sup> Bell Atlantic provides competitive LECs with basic white page directory listings under interconnection agreements and tariffs. Bell Atlantic Lacouture/Troy Decl. at para. 194. Additional white page listings and other white page listing services are provided under tariff on the same terms and conditions as those provided to Bell Atlantic customers. *Id.* See also Bell Atlantic App. C, Tab 535 (KPMG Closure Report for Exception 56, 7/22/99).

<sup>1112</sup> Bell Atlantic Application at 30; Bell Atlantic Lacouture/Troy Decl. at para. 195. See *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20748-49; see also New York PSC Comments at 122-23; ALTS Comments at 17-18; Intermedia Comments at 10.

<sup>1113</sup> Bell Atlantic Application at 30; Bell Atlantic Lacouture/Troy Decl. at para. 196. See *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20749-50.

<sup>1114</sup> New York Commission Comments at 123.

<sup>1115</sup> AT&T Comments at 41-44; Choice One Comments at 7-8.

<sup>1116</sup> See *supra* Section V.B.

themselves as a result.<sup>1117</sup> Moreover, although Choice One provides evidence of one dropped white pages directory listing,<sup>1118</sup> we do not find that this isolated incident is reflective of a systemic problem with Bell Atlantic's provisioning of their listings.

## **I. Checklist Item 9 – Numbering Administration**

### **1. Background**

362. Section 271(c)(2)(B)(ix) of the 1996 Act requires a BOC to provide “nondiscriminatory access to telephone numbers for assignment to the other carrier’s telephone exchange service customers,” until “the date by which telecommunications numbering administration, guidelines, plan, or rules are established.”<sup>1119</sup> The checklist mandates compliance with “such guidelines, plan, or rules” after they have been established.<sup>1120</sup>

363. Bell Atlantic does not assign telephone numbers to itself or competitive LECs. The Commission has designated NeuStar, Inc. (“NeuStar”) as the North American Numbering Plan Administrator.<sup>1121</sup> NeuStar is responsible for assigning blocks of 10,000 telephone numbers (NXX Codes) to carriers within each area code, and for coordinating area code relief planning efforts with state commissions.<sup>1122</sup> Bell Atlantic must demonstrate that it adheres to industry numbering administration guidelines and Commission rules, including provisions requiring the accurate reporting of data to the code administrator.<sup>1123</sup>

### **2. Discussion**

364. Based on the evidence in the record, we find that Bell Atlantic satisfies the requirements of checklist item 9.<sup>1124</sup> No commenters allege that Bell Atlantic has failed to meet

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<sup>1117</sup> AT&T Comments at 41-44; AT&T Callahan/Connolly Aff. KPMG similarly found little evidence of actual dropped listings in its discussion of problems with Bell Atlantic's OSS for white pages directory listings orders. Bell Atlantic Application App. C, Tab 535 (KPMG Closure Report for Exception 56, 7/22/99). *See also* Bell Atlantic Application at 31; Bell Atlantic Lacouture/Troy Decl. at para. 210.

<sup>1118</sup> Choice One Comments at 7-8.

<sup>1119</sup> 47 U.S.C. § 271(c)(2)(B)(ix).

<sup>1120</sup> *Id.*

<sup>1121</sup> In the Matter of Request of Lockheed Martin Corporation and Warburg, Pincus & Co. for Review of the Transfer of the Lockheed Martin Communications Industry Services Business, CC Docket No. 92-237, Order, FCC 99-346 (rel. Nov. 17, 1999). *See generally* 47 C.F.R. Part 52 – Numbering, Subpart B – Administration, §§ 52.7-52.19.

<sup>1122</sup> *See Administration of the North American Numbering Plan*, Report and Order, 11 FCC Rcd 2588, 2615; *NANP Third Report and Order*, 12 FCC Rcd at 23042-46; *see also* Bell Atlantic Lacouture/Troy Decl. at para. 211.

<sup>1123</sup> *See Second Louisiana Order*, 13 FCC Rcd at 20752. *See also* Bell Atlantic Lacouture/Troy Decl. at para. 213. *See, e.g.*, Central Office Code (NXX) Assignment Guidelines (INC 95-0407-008) (revised August 1999).

<sup>1124</sup> Bell Atlantic Lacouture/Troy Decl. at para. 213. *See also* Bell Atlantic Application App. C, Tab 535 (KPMG Closure Report for Exception 46, 7/22/99).

the requirements for this checklist item. The New York Commission states that Bell Atlantic has demonstrated that it complies with the Commission's number assignment rules and Industry Numbering Committee Central Office Code Guidelines, and that it accurately reports data to the Central Office Code Administrator.<sup>1125</sup>

## **J. Checklist Item 10 – Databases and Associated Signaling**

### **1. Background**

365. Section 271(c)(2)(B)(x) of the 1996 Act requires a BOC to provide “nondiscriminatory access to databases and associated signaling necessary for call routing and completion.”<sup>1126</sup> In the *Second BellSouth Louisiana Order*, we required BellSouth to demonstrate that it provided requesting carriers with nondiscriminatory access to: “(1) signaling networks, including signaling links and signaling transfer points; (2) certain call-related databases necessary for call routing and completion, or in the alternative, a means of physical access to the signaling transfer point linked to the unbundled database; and (3) Service Management Systems (SMS);”<sup>1127</sup> and to design, create, test, and deploy Advanced Intelligent Network (AIN) based services at the SMS through a Service Creation Environment (SCE).<sup>1128</sup>

### **2. Discussion**

366. Based on the evidence in the record, we find that Bell Atlantic satisfies the requirements of checklist item 10.<sup>1129</sup> No commenters allege that Bell Atlantic has failed to meet the requirements for this section. The New York Commission concludes that Bell Atlantic meets this checklist item.<sup>1130</sup> Although Z-Tel states “it is impossible to verify whether Bell Atlantic actually can provision AIN related services, because no carrier presently purchases these services from Bell Atlantic,”<sup>1131</sup> we note that Bell Atlantic is not required to actually furnish a particular item in order to satisfy its obligations under the checklist. Rather, as we have previously stated, if no competitor is actually using a checklist item, a BOC must show that it has a concrete and specific legal obligation to furnish the item upon request and be “presently ready to furnish each item in the quantities that competitors may reasonably demand and at an acceptable level of

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<sup>1125</sup> New York Commission Comments at 127. Bell Atlantic's compliance is also supported by KPMG's findings. Bell Atlantic Lacouture/Troy Decl. at para. 216.

<sup>1126</sup> 47 U.S.C. § 271(c)(2)(B)(x).

<sup>1127</sup> *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20753.

<sup>1128</sup> *Id.* at 20755-56.

<sup>1129</sup> Bell Atlantic Application at 31-33; Bell Atlantic Lacouture/Troy Decl. at paras. 218-247. Bell Atlantic provides access to signaling, call-related databases, SCE, and the SMS databases under interconnection agreements and tariffs. Bell Atlantic Lacouture/Troy Decl. at paras. 220, 226, 229, 232, 234, 238, 242, 245.

<sup>1130</sup> New York Commission Comments at 133.

<sup>1131</sup> Z-Tel Comments at 23.

quality.”<sup>1132</sup> We find that Bell Atlantic has met this burden.<sup>1133</sup>

## K. Checklist Item 11 – Number Portability

### 1. Background

367. Section 271 (c)(2)(B)(xi) of the 1996 Act requires a BOC to be in compliance with the number portability regulations the Commission has adopted pursuant to section 251 of the 1996 Act.<sup>1134</sup> Section 251(b)(2) of the 1996 Act requires all LECs “to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission.”<sup>1135</sup> The 1996 Act defines number portability as “the ability of users of telecommunications services to retain, at the same location, existing telecommunications numbers without impairment of quality, reliability, or convenience when switching from one telecommunications carrier to another.”<sup>1136</sup> The Commission has incorporated this definition into its rules.<sup>1137</sup> Moreover, to prevent the cost of number portability from thwarting local competition, Congress enacted section 251(e)(2), which requires that “[t]he cost of establishing telecommunications numbering administration arrangements and number portability shall be borne by all telecommunications carriers on a competitively neutral basis as determined by the Commission.”<sup>1138</sup>

368. Pursuant to these statutory provisions, the Commission requires LECs to offer interim number portability “to the extent technically feasible.”<sup>1139</sup> The Commission also requires LECs to gradually replace interim number portability with permanent number portability.<sup>1140</sup> The Commission has established guidelines for states to follow in mandating a competitively neutral

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<sup>1132</sup> *Ameritech Michigan Order*, 12 FCC Rcd at 20602; *BellSouth South Carolina Order*, 13 FCC Rcd at 582.

<sup>1133</sup> See also *Bell Atlantic Lacouture/Troy Decl.* at paras. 243-247.

<sup>1134</sup> 47 U.S.C. § 271(c)(2)(B)(xi).

<sup>1135</sup> 47 U.S.C. § 251(b)(2).

<sup>1136</sup> 47 U.S.C. § 153(30).

<sup>1137</sup> 47 C.F.R. § 52.21(k).

<sup>1138</sup> *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20757 (citing 47 U.S.C. § 251(e)(2) and *In the Matter of Telephone Number Portability*, Third Report and Order, 13 FCC Rcd 11701, 11702-11704, para. 4 & nn.4, 7, 9, 12 (1998) (*Third Number Portability Order*)). See also *In the Matter of Telephone Number Portability*, Fourth Memorandum Opinion and Order on Reconsideration, CC Docket No. 95-116, RM 8535 at paras. 1, 6-9 (June 23, 1999) (*Fourth Number Portability Order*).

<sup>1139</sup> *Fourth Number Portability Order* at para. 10 (citing *In re Telephone Number Portability*, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 8352, 8409-12 (1996) (*First Number Portability Order*)). See also 47 U.S.C. § 251(b)(2).

<sup>1140</sup> See 47 C.F.R. §§52.23(b)-(f); *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20758; *First Number Portability Order*, 11 FCC Rcd at 8355-56, 8399-8404; *Third Number Portability Order*, 13 FCC Rcd at 11708-12.

cost-recovery mechanism for interim number portability,<sup>1141</sup> and created a competitively neutral cost-recovery mechanism for long-term number portability.<sup>1142</sup>

## 2. Discussion

369. Based on the evidence in the record, we conclude that Bell Atlantic complies with the requirements of checklist item 11.<sup>1143</sup> The New York Commission concludes that Bell Atlantic has satisfied this checklist item.<sup>1144</sup>

370. RCN states that Bell Atlantic will not provide number portability to customers with RCN-issued telephone numbers.<sup>1145</sup> For example, RCN asserts that, in the last few months, Bell Atlantic has refused to allow RCN's customers that switch to Bell Atlantic to keep a RCN-issued telephone number.<sup>1146</sup> Bell Atlantic denies this allegation.<sup>1147</sup> We do not find that RCN's unsupported assertions are indicative of a systemic failure in Bell Atlantic's provision of number portability.

371. Adelphia and AT&T allege that Bell Atlantic has problems coordinating number portability with loop cutovers. Specifically, Adelphia maintains that "Bell Atlantic frequently activates number portability prematurely,"<sup>1148</sup> resulting in customers being unable to receive telephone calls.<sup>1149</sup> AT&T implies that Bell Atlantic's problems with hot cuts have "adversely affected" number portability.<sup>1150</sup> Like RCN's claim, we find both Adelphia and AT&T's claims to be unsupported, conclusory allegations that do not warrant a finding of noncompliance with this checklist item.<sup>1151</sup>

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<sup>1141</sup> See 47 C.F.R. § 52.29; *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20758; *First Number Portability Order*, 11 FCC Rcd at 8417-24.

<sup>1142</sup> See 47 C.F.R. § 52.32-52.33; *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20578; *Third Number Portability Order*, 13 FCC Rcd at 11706-07; *Fourth Number Portability Order* at para. 9; see generally *Fourth Number Portability Order*.

<sup>1143</sup> Bell Atlantic Application at 33-34; Bell Atlantic Lacouture/Troy Decl. at paras. 248-256. Bell Atlantic provides number portability to requesting carriers under interconnection agreements and tariffs. Bell Atlantic Lacouture/Troy Decl. at paras. 249, 255.

<sup>1144</sup> New York Commission Comments at 136.

<sup>1145</sup> RCN Comments at 10-11.

<sup>1146</sup> *Id.* at 10.

<sup>1147</sup> Bell Atlantic Reply Lacouture/Troy Decl. at paras. 117-118.

<sup>1148</sup> Adelphia Livengood Aff. at para. 17.

<sup>1149</sup> See *id.*

<sup>1150</sup> See AT&T Meek Aff. at paras. 42-43.

<sup>1151</sup> See *supra* Section V.D (for further discussion regarding Bell Atlantic's hot cut provisioning).

**L. Checklist Item 12 – Local Dialing Parity****1. Background**

372. Section 271(c)(2)(B)(xii) requires a BOC to provide “[n]ondiscriminatory access to such services or information as are necessary to allow the requesting carrier to implement local dialing parity in accordance with the requirements of section 251(b)(3).”<sup>1152</sup> Section 251(b)(3) imposes upon all LECs “[t]he duty to provide dialing parity to competing providers of telephone exchange service and telephone toll service with no unreasonable dialing delays.”<sup>1153</sup> Section 153(15) of the Act defines “dialing parity” to mean that:

... a person that is not an affiliate of a local exchange carrier is able to provide telecommunications services in such a manner that customers have the ability to route automatically, without the use of any access code, their telecommunications to the telecommunications services provider of the customer’s designation . . .<sup>1154</sup>

373. Customers of competing carriers must be able to dial the same number of digits the BOC’s customers dial to complete a local telephone call.<sup>1155</sup> Moreover, customers of competing carriers must not otherwise suffer inferior quality service, such as unreasonable dialing delays, compared to the BOC’s customers.<sup>1156</sup>

**2. Discussion**

374. Based on the evidence in the record, we find that Bell Atlantic demonstrates that it provides local dialing parity in accordance with the requirements of section 251(b)(3) and thus satisfies the requirements of this checklist item.<sup>1157</sup> No commenter challenges Bell Atlantic’s assertion that it provides local dialing parity. The New York Commission concludes that Bell

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<sup>1152</sup> Based on the Commission’s view that section 251(b)(3) does not limit the duty to provide dialing parity to any particular form of dialing parity (i.e., international, interstate, intrastate, or local), the Commission in August 1996 adopted rules to implement broad guidelines and minimum nationwide standards for dialing parity. *Local Competition Second Report and Order*, 11 FCC Rcd 19392 at 19407; *Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket No. 9-98, *Further Order On Reconsideration*, FCC 99-170 (rel. July 19, 1999).

<sup>1153</sup> 47 U.S.C. § 251(b)(3).

<sup>1154</sup> *Id.* at § 153(15).

<sup>1155</sup> 47 C.F.R. §§ 51.205, 51.207.

<sup>1156</sup> See 47 C.F.R. § 51.207 (requiring same number of digits to be dialed); *Local Competition Second Report and Order*, 11 FCC Rcd at 19400, 19403.

<sup>1157</sup> Bell Atlantic Lacouture/Troy Decl. at paras. 257-261, Att. A.

Atlantic meets the requirements of this checklist obligation.<sup>1158</sup>

**M. Checklist Item 13 -- Reciprocal Compensation.**

**1. Background**

375. Section 271(c)(2)(B)(xiii) of the Act requires that a BOC's access and interconnection includes "[r]eciprocal compensation arrangements in accordance with the requirements of section 252(d)(2)."<sup>1159</sup> In turn, section 252(d)(2)(A) states that "a State commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless (i) such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier; and (ii) such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls."<sup>1160</sup>

**2. Discussion.**

376. Based on the evidence in the record, we conclude that Bell Atlantic demonstrates that its access and interconnection include reciprocal compensation arrangements in accordance with the requirements of section 252(d)(2), and thus, satisfies the requirements of checklist item 13.<sup>1161</sup> Bell Atlantic demonstrates that it (1) has reciprocal compensation arrangements in accordance with section 252(d)(2) in place,<sup>1162</sup> and (2) is making all required payments in a timely fashion.<sup>1163</sup> The New York Commission concludes that Bell Atlantic is in compliance with

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<sup>1158</sup> New York Commission Comments at 137-139. *See also* ALTS Comments at 21 (Bell Atlantic appears to provide local dialing parity); Intermedia Comments at 12-13 (Bell Atlantic appears to be providing local dialing parity throughout New York).

<sup>1159</sup> 47 U.S.C. § 271(c)(2)(B)(xiii).

<sup>1160</sup> *Id.* § 252(d)(2)(A).

<sup>1161</sup> Bell Atlantic Lacouture/Troy Decl. at para. 262.

<sup>1162</sup> Bell Atlantic provides reciprocal compensation to competing carriers for the termination of local calls from Bell Atlantic customers under approved interconnection agreements and tariffs. (*See, e.g.,* AT&T Interconnection Agreement). During the first seven months of 1999, Bell Atlantic exchanged an average of 2.5 billion minutes of traffic each month with 27 local wireline carriers in New York. During this period, Bell Atlantic paid more than 98.4 million dollars to competitive LECs as reciprocal compensation. Bell Atlantic asserts that it is paying reciprocal compensation payments consistent with the New York Commission's order, which governs Internet Service Provider (ISP) bound traffic. *See* Opinion and Order Concerning Reciprocal Compensation, Case 99-C-0529 (NYPSC Aug. 26, 1999) (*NYPSC Reciprocal Compensation Order*). *See also* Bell Atlantic Brief at 34; Bell Atlantic Lacouture/Troy Decl. at paras. 262-264; Bell Atlantic Lacouture/Troy Reply Decl. at paras. 119-124.

<sup>1163</sup> With regard to the second requirement, we note that section 271(c)(2)(A)(i) requires a showing that a BOC "is providing access and interconnection pursuant to one or more agreements . . . or . . . is generally offering access and interconnection pursuant to [an SGAT]." 47 U.S.C. § 271(c)(2)(A)(i) (*emphasis added*).

checklist item 13.<sup>1164</sup>

377. We are not persuaded by Global NAPS' claim that Bell Atlantic fails to meet this checklist item. Global NAPS argues that Bell Atlantic acts in an anticompetitive manner with respect to payments for traffic terminated by competitive LECs to ISPs by, among other things, failing to pay compensation in a timely manner under the parties' interconnection agreement, and disputing the amount of per-minute compensation payment which is owed pursuant to the *NYPSC Reciprocal Compensation Order*.<sup>1165</sup> Global NAPS also disputes Bell Atlantic's assertion that it is complying with the *NYPSC Reciprocal Compensation Order* requiring compensation for ISP-bound calls.<sup>1166</sup> In light of our prior ruling that "ISP-bound traffic is non-local interstate traffic" and that "the reciprocal compensation requirements of section 251(b)(5) of the Act . . . do[es] not govern inter-carrier compensation for this traffic," we conclude that Global NAPS' arguments are irrelevant to checklist item 13.<sup>1167</sup> We recognize that Bell Atlantic has an obligation to comply with New York Commission orders concerning inter-carrier compensation for ISP-bound traffic, pursuant to our *Inter-Carrier Compensation for ISP-Bound Traffic Order* and pending completion of our rulemaking on this issue.<sup>1168</sup> Inter-carrier compensation for ISP bound traffic, however, is not governed by section 251(b)(5), and, therefore, is not a checklist item. In addition, we deny e.spire's request that we condition any Bell Atlantic 271 authority on Bell Atlantic's promise to pay any reciprocal compensation amounts currently due.<sup>1169</sup> The statute requires Bell Atlantic to make reciprocal compensation in a timely manner and as stated above, we find that Bell Atlantic complies with this provision.

## N. Checklist Item 14 – Resale

### 1. Background

378. Section 271(c)(2)(B)(xiv) of the Act requires a BOC to make "telecommunications services . . . available for resale in accordance with the requirements of sections 251(c)(4) and 252(d)(3)."<sup>1170</sup> Section 251(c)(4)(A) requires incumbent LECs "to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to

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<sup>1164</sup> New York Commission Comments at 144.

<sup>1165</sup> Global NAPS Comments at 2-4.

<sup>1166</sup> *Id.* at 2.

<sup>1167</sup> Implementation of the Local Competition Provisions in the Telecommunications Act of 1996: Inter-Carrier Compensation for ISP-Bound Traffic, Declaratory Rulemaking and Notice of Proposed Rulemaking, 14 FCC Rcd 3689 at n.87 (1999) (*Inter-Carrier Compensation for ISP-Bound Traffic Order*).

<sup>1168</sup> *Inter-Carrier Compensation for ISP-Bound Traffic Order*, 14 FCC Rcd at 3707-3710.

<sup>1169</sup> See Letter and Attachment from Ross A. Buntrock, Attorney, Kelley Drye & Warren, LLP, Counsel for e.spire, to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 99-295 (filed Nov. 3, 1999) (e.spire Nov. 3 Ex Parte Letter).

<sup>1170</sup> 47 U.S.C. § 271(c)(2)(B)(xiv).



subscribers who are not telecommunications carriers."<sup>1171</sup> Section 251(c)(4)(B) prohibits "unreasonable or discriminatory conditions or limitations" on resale, with the exception that "a State commission may, consistent with regulations prescribed by the Commission under this section, prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category of subscribers from offering such service to a different category of subscribers."<sup>1172</sup> Section 252(d)(3) sets forth the basis for determining "wholesale rates" as the "retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier."<sup>1173</sup>

379. In the *Local Competition First Report and Order*, the Commission promulgated several rules regarding the scope of the resale requirement and permissible restrictions on resale that a LEC may impose.<sup>1174</sup> Most significantly, resale restrictions are presumed to be unreasonable unless the LEC "proves to the state commission that the restriction is reasonable and non-discriminatory."<sup>1175</sup>

380. Finally, in accordance with section 271(c)(2)(B)(ii) and section 271(c)(2)(B)(xiv), a BOC must demonstrate that it provides nondiscriminatory access to operations support systems for the resale of its retail telecommunications services.

## 2. Discussion

381. Based on the evidence in the record, we conclude that Bell Atlantic demonstrates that it makes telecommunications services available for resale in accordance with sections 251(c)(4) and 252(d)(3) and thus, satisfies the requirements of checklist item 14.<sup>1176</sup> Bell Atlantic demonstrates that it: (1) offers for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers,<sup>1177</sup> and (2)

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<sup>1171</sup> 47 U.S.C. § 251(c)(4)(A).

<sup>1172</sup> 47 U.S.C. § 251(c)(4)(B).

<sup>1173</sup> 47 U.S.C. § 252(d)(3).

<sup>1174</sup> See, e.g., 47 C.F.R. §§ 51.613-51.617. The Eighth Circuit acknowledged the Commission's authority to promulgate such rules, and specifically upheld the sections of the Commission's rules concerning resale of promotions and discounts in *Iowa Utilities Board. Iowa Utils. Bd. v. FCC*, 120 F.3d at 818-19, *aff'd in part and remanded on other grounds*, *AT&T v. Iowa Utils. Bd.*, 119 S.Ct. 721 (1999).

<sup>1175</sup> 47 C.F.R. § 51.613(b).

<sup>1176</sup> Bell Atlantic Lacouture/Troy Decl. at para. 265.

<sup>1177</sup> The telecommunications services that Bell Atlantic provides at retail to subscribers that are not telecommunications carriers are available at the following discount levels ordered by the New York Commission: 19.1 percent for lines with Bell Atlantic's Operator Services and Directory Assistance, and 21.7 percent for lines without these features. Bell Atlantic Application at 35, Bell Atlantic Lacouture/Troy Decl. at para. 265, *Opinion and Order Determining Wholesale Discount*, Case No. 95-C-0657 (NYPSC Nov. 27, 1996) (Bell Atlantic Application App.G, Tab 7) (*NYSPSC Wholesale Discount Order*). Bell Atlantic's retail telecommunications services are available for resale under interconnection agreements and its tariffs. Bell Atlantic Application at 35, Bell Atlantic Lacouture/Troy Decl. at para. 266. Through July 1999, Bell Atlantic has provided 314,000 resold

offers such telecommunications services for resale without unreasonable or discriminatory conditions or limitations.<sup>1178</sup> Bell Atlantic demonstrates that it provides nondiscriminatory access to operations support systems for the resale of its retail telecommunications services. The New York Commission states that Bell Atlantic is in compliance with this checklist item.<sup>1179</sup>

382. We are unpersuaded by CCA's arguments that Bell Atlantic does not comply with checklist item 14 because the difference between Bell Atlantic's wholesale rates and retail rates is so narrow that it precludes a profit and hinders competition.<sup>1180</sup> CCA asserts that in New York, for example, one of Bell Atlantic's regional toll plans is priced below a reseller's cost to buy end-to-end wholesale switched access service.<sup>1181</sup> In addition, CCA contends that Bell Atlantic offers discriminatory pricing by offering resold services at an across the board discount off standard end user "tariff" prices even though each local product, service or vertical feature carries a different retail profit margin above its cost.<sup>1182</sup> CCA maintains that "the unitary discount forces the reseller to pay end-user retail profit margins instead of carrier based profit margins and that the margins above costs that Bell Atlantic collects from resellers should be no different than those collected from facilities-based carriers."<sup>1183</sup> CCA argues that because of this pricing

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lines to more than 65 competing carrier including more that 250,000 business lines and more than 63,000 residential lines. Also, as of September 1999, Bell Atlantic has provided 319,000 resold lines to more than 65 competing carriers. In addition, forty companies resell more than 100 lines, 22 companies resell more than 1,000 lines, and five companies resell more than 10,000 lines. Of the 522 Bell Atlantic wire centers in New York, 90 percent have at least one resold listing, and 64 have at least 10. Bell Atlantic Application at 35, Bell Atlantic Reply at 30, Bell Atlantic Lacouture/Troy Decl. at para. 267, Bell Atlantic Lacouture/Troy Reply Decl. at para. 159, Bell Atlantic Taylor Decl. at para. 42.

<sup>1178</sup> Bell Atlantic's customer-specific arrangements (CSAs), grandfathered services and promotional offerings in effect more than 90 days are also provided at wholesale discounts set by the New York Commission. Bell Atlantic Application at 35, Bell Atlantic Lacouture/Troy Del. at para. 268. Customer-specific arrangements or contract service arrangements are contractual agreements made between a carrier and a specific customer, tailored to that customer's individual needs. The customer is typically a high-volume user of telecommunications services. Contract service arrangements may include volume and term arrangements, special service arrangements, customized telecommunications service arrangements and master service agreements. e.Spire/Net2000 Comments at 7 (citing *Order Granting Petition*, Case No. 98-C-426 (NYPSC Sept. 14, 1998) (*NYPSC CTC Order*)). We note that promotional offerings for a period greater than 90 days must be offered for resale at wholesale rates pursuant to section 251(c)(4)(A). *Local Competition First Report and Order*, 11 FCC Rcd at 15970. If Bell Atlantic's promotional offering is limited to 90 days or less, the CLEC may elect to have Bell Atlantic apply the wholesale discount to the retail price of telecommunications services included in the promotional offering, or pay the promotional offering price. Bell Atlantic Lacouture/Troy Decl. at para. 268. We note that there is a presumption that promotional offerings for a period of 90 days or less need not be offered at a discount to resellers. *Local Competition First Report and Order*, 11 FCC Rcd at 15970.

<sup>1179</sup> New York Commission Comments at 150-151.

<sup>1180</sup> CCA Comments at 2, 4-5. *See also* ALTS Reply at 15.

<sup>1181</sup> CCA Comments at 4.

<sup>1182</sup> CCA Comments at 6.

<sup>1183</sup> *Id.*

structure, Bell Atlantic forces a reseller to overpay for products and services.<sup>1184</sup>

383. Section 252(d)(3) provides that "a State commission shall determine the wholesale rates on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier."<sup>1185</sup> Bell Atlantic maintains that it provides services at wholesale discounts set by the New York Commission: 19.1 percent for lines with Bell Atlantic's Operator Services and Directory Assistance, and 21.7 percent for lines without these features.<sup>1186</sup> In addition, the New York Commission states that it set non-recurring charges for resellers in a manner consistent with the Commission's pricing regulations, and they are subject to further examination in a pending proceeding.<sup>1187</sup> CCA provides no evidence that the New York Commission failed to adhere to the statutory requirements in setting the wholesale rates with respect to marketing, billing, collection and other avoided costs. Furthermore, in the *Local Competition First Report and Order*, the Commission recognized "that a uniform rate is simple to apply, and avoids the need to allocate avoided costs among services."<sup>1188</sup> Although the Commission observed that avoided costs may, in fact, vary among services, it neither prohibited nor required use of a single, uniform discount rate for all of an incumbent LEC's services.<sup>1189</sup> Thus, we find that Bell Atlantic makes available telecommunications services at wholesale rates established by the New York Commission as required by the statute.

384. *Termination liabilities.* Bell Atlantic maintains that it "does not impose any unreasonable or discriminatory conditions or limitations on the resale of its telecommunications services."<sup>1190</sup> As discussed below, we are not persuaded by commenters that Bell Atlantic imposes unreasonable or discriminatory conditions or limitations on the resale of its services. Thus, we find sufficient evidence that Bell Atlantic is satisfying the requirement in checklist item 14 that it offers its telecommunications services for resale in accordance with section 251(c)(4)(B) of the Act.

385. Resellers may resell any of Bell Atlantic's CSAs to any customer that meets the terms and conditions of that particular arrangement, and customers may aggregate traffic from multiple customers to satisfy any volume requirement.<sup>1191</sup> In addition, if a customer elects to terminate its service with Bell Atlantic, it may be subject to termination liabilities to the extent it

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<sup>1184</sup> *Id.*

<sup>1185</sup> 47 U.S.C. § 252(d)(3).

<sup>1186</sup> Bell Atlantic Lacouture/Troy Decl. at para. 265. See also NYPSC *Wholesale Discount Order* at 79.

<sup>1187</sup> New York Commission Comments at 148 (citing Second Network Proceeding, Case 98-C-1357).

<sup>1188</sup> *Local Competition First Report and Order*, 11 FCC Rcd at 15957-58.

<sup>1189</sup> *Id.*

<sup>1190</sup> Bell Atlantic Lacouture/Troy Decl. at para. 266.

<sup>1191</sup> Bell Atlantic Application at 36; Bell Atlantic Lacouture/Troy Decl. at para. 268-270.

was part of the CSA agreed to by the customer.<sup>1192</sup> For example, Bell Atlantic explains that, if a customer terminates a five-year CSA for Centrex after two years, the termination liability will be the difference between what the customer would have paid under a two-year CSA and what the customer actually paid under the five-year CSA. According to Bell Atlantic, the Commission has previously recognized that these types of termination liabilities are both permissible and pro-competitive.<sup>1193</sup>

386. ALTS, e.spire/Net2000, and TRA argue that the termination liability provisions contained in Bell Atlantic's contracts are anti-competitive, unjust, unreasonable, excessive or unfair. Except for TRA, they contend that the Commission should adopt a "fresh look" requirement in which customers would be able to terminate long-term contracts without incurring any penalty before or upon any Bell Atlantic section 271 relief.<sup>1194</sup> The commenters contend that such a requirement is consistent with prior Commission decisions that adopted a "fresh look" policy because of changed circumstances, such as when a monopoly marketplace opens to competition, or where a regulatory area was subject to significantly altered circumstances.<sup>1195</sup> Bell Atlantic responds that its termination liabilities are pro-competitive, reasonable, and have not inhibited competing carriers from obtaining customers.<sup>1196</sup>

387. It appears that termination liability is not calculated in the same manner for all contracts. For example, Bell Atlantic's termination liability for Centrex customers is limited to the difference between what the customer would have paid under the shorter term and what the customer actually paid under the long-term contract.<sup>1197</sup> This method for calculating liability comports with the method that we recognized in the *Expanded Interconnection Order*.<sup>1198</sup>

388. e.spire/Net2000 contend that Bell Atlantic's termination liability constitutes a

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<sup>1192</sup> Bell Atlantic Lacouture/Troy Decl. at para. 270.

<sup>1193</sup> Bell Atlantic Brief at 36 (citing *Expanded Interconnection First Reconsideration Order*, 8 FCC Rcd at 7341). See also *BellSouth South Carolina Order*, 13 FCC Rcd at 539.

<sup>1194</sup> ALTS Comments at 65-67; e.spire/Net2000 Comments at 3-10; TRA Comments at 23-28; ALTS Reply at 14; Letter from Ross A. Buntrock, Attorney, Kelley Drye & Warren, LLP, Counsel for ALTS, to Magalie Salas, Secretary, Federal Communications Commission, CC Docket No. 99-295 (filed Nov. 3, 1999) (ALTS Nov. 3 *Ex Parte* Letter); Letter from Ross A. Buntrock, Attorney, Kelley Drye & Warren, LLP, Counsel for e.spire, to Magalie Salas, Secretary, Federal Communications Commission, CC Docket No. 99-295 (filed Nov. 3, 1999) (e.spire Nov. 3 *Ex Parte* Letter); Letter from Ross A. Buntrock, Attorney, Kelley Drye & Warren, LLP, Counsel for Net.2000, to Magalie Salas, Secretary, Federal Communications Commission, CC Docket No. 99-295 (filed Nov. 3, 1999) (Net.2000 Nov. 3 *Ex Parte* Letter); Letter from Ross A. Buntrock, Attorney, Kelley Drye & Warren, Counsel for Net2000, to Claudia Pabo, Federal Communications Commission, CC Docket No. 99-295 (filed Dec. 3, 1999) (Net.2000 Dec. 3 *Ex Parte* Letter).

<sup>1195</sup> ALTS Comments at 87-88; e.spire/Net2000 at 8-9.

<sup>1196</sup> Bell Atlantic Reply Application at 30-31; Bell Atlantic Lacouture/Troy Reply Decl. at paras. 163-167.

<sup>1197</sup> Bell Atlantic Application at 36; Bell Atlantic Reply at 30-31; Bell Atlantic Lacouture/Troy Reply Decl. at para. 166.

<sup>1198</sup> *Expanded Interconnection Order*, 7 FCC Rcd at 7464-7465 n.466.

"take or pay" contract with respect to Flex Path T-1 service.<sup>1199</sup> Based on their understanding of Bell Atlantic's pricing structure for Flex Path T-1 services, e.spire/Net2000 maintain that customers are not entitled to any additional discounts based on the duration of the contract. Therefore, they assert that Flex Path T-1 service customers cannot realistically terminate their contract to move to a competitor since they will still be charged for the service.<sup>1200</sup>

389. In the *BellSouth South Carolina*<sup>1201</sup> section 271 proceeding, the Commission expressed concern with the application of termination liabilities to situations where a new entrant sought to assume an existing CSA contract. The Commission stated that "[b]ecause, depending, on the nature of these [termination] fees, their imposition creates additional costs for a CSA customer that seeks service from a reseller, they may have the effect of insulating portions of the market from competition through resale."<sup>1202</sup> Thus, under these circumstances, termination liability could constitute an unreasonable restriction on resale.

390. We do not have the same concerns here. Although the Commission has adopted "fresh look" requirements in prior proceedings,<sup>1203</sup> the Commission has not adopted such a policy for the CSAs at issue here, which are generally regulated by the states. The New York Commission has already addressed Bell Atlantic's policy of imposing termination charges specified in an original CSA, when a reseller wishes to resell the services covered by an existing CSA and the reseller accepts the terms and conditions set forth in the original contract. The New York Commission has held "that termination penalties may not be assessed in instances where the transaction involves an assignment of the customer's contract with Bell Atlantic-NY, and that Bell Atlantic-NY may not unreasonably bar such an assignment."<sup>1204</sup> Therefore, pursuant to the New York Commission *CTC Order*, the termination liabilities complained of here would not be triggered by an assignment of the contract. Rather, the termination liability is only triggered by a complete termination of the contract. Accordingly, the termination liabilities do not constitute a restriction on resale under checklist 14. Although termination liabilities that apply when a customer terminates a contract to take service from another provider could, in certain

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<sup>1199</sup> e.spire/Net2000 Comments at 5; Net.2000 Dec. 3 *Ex Parte* Letter. According to Net.2000, Flexpath is essentially a T-1 line service for those customers who utilize PBX systems. Net2000 Dec. 3 *Ex Parte* Letter at 5.

<sup>1200</sup> e.spire/Net2000, Net.2000 Dec. 3 *Ex Parte* Letter at 5.

<sup>1201</sup> *BellSouth South Carolina Order*, 13 FCC Rcd at 539, 662.

<sup>1202</sup> *BellSouth South Carolina Order*, 13 FCC Rcd at 662.

<sup>1203</sup> See, e.g., *Expanded Interconnection Order*, 7 FCC Rcd at 7463-64; *Interexchange Marketplace Order*, 6 FCC Rcd 5880, 5906 (1991); *Amendment of the Commission's Rules Relative to Allocation of the 849-851/894-896 MHz Bands*, 6 FCC Rcd 4582, 4583-84 (1991). See also 47 U.S.C. § 253.

<sup>1204</sup> New York Commission Reply at 40 (citing *NYPSC CTC Order*). We note that the New York Commission expressed concern about Bell Atlantic's use of termination liability, but did not find that Bell Atlantic's past actions constituted a violation of 47 U.S.C. § 251(b)(1) or section 251(c)(4). New York Commission Reply at 40 (citing *Order Denying Motion to Compel and for Sanctions and Clarifying the Order Granting Petition Complaint of CTC Communications Inc.*, Case No. 98-C-426 (NYPSC Feb. 1, 1999) (*NYPSC Order Denying Motions and Clarification Order*)).

circumstances, be unreasonable or anticompetitive,<sup>1205</sup> they may not on their face put a carrier out of compliance with checklist item 14.<sup>1206</sup> Therefore, the absence of a “fresh look” requirement is not a basis for rejecting a section 271 application. In addition, as the New York Commission points out, parties may file a complaint about a termination liability provision at the New York Commission,<sup>1207</sup> or initiate a proceeding under section 253 of the 1996 Telecommunications Act.<sup>1208</sup> We find that the record does not support a finding that termination liability provisions contained in Bell Atlantic’s CSAs constitute an unreasonable or discriminatory condition or limitation on the resale of its telecommunications services.

391. Several commenters also suggest that the Commission should impose a “fresh look” requirement in this proceeding on public interest grounds, that is, as part of our analysis under section 271(d)(3)(C).<sup>1209</sup> We note that a similar issue has been raised by KMC Telecom in a Petition for Declaratory Rulemaking, which is now pending before the Commission.<sup>1210</sup> We conclude that issues raised by parties in this proceeding relating to contract termination liability are more appropriately resolved in the context of that pending petition, and we thus decline to resolve the issue in this proceeding.

392. *Resale of xDSL-based services.* We are not persuaded by TRA’s argument that Bell Atlantic is restricting resale in violation of section 251(c)(xiv) because it does not make volume and term offerings of xDSL-based services available for resale. According to TRA, in the *BellSouth Louisiana Order* the Commission stated that “any service sold to end users is a retail services and thus is subject to the wholesale discount requirement, even if it is already priced at a discount of another retail service.”<sup>1211</sup> TRA contends that, by declining to make volume and term offerings of xDSL-based services available for resale, Bell Atlantic is creating a general exemption from the wholesale requirement. TRA further argues that in the *Local Competition Order* we stated that section 251(c)(4) “makes no exceptions for promotional or discounted offerings.”<sup>1212</sup> Bell Atlantic responds that it is making all of its ADSL

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<sup>1205</sup> See New York Commission Reply at 41.

<sup>1206</sup> Thus, we need not evaluate Bell Atlantic’s liability provisions for termination of Flex Path T-1 service contracts in this proceeding because the termination liability does not on its fact constitute a violation of checklist item 14.

<sup>1207</sup> New York Commission Reply at 41.

<sup>1208</sup> 47 U.S.C. § 253.

<sup>1209</sup> See KMC Comments at 13; see also Allegiance Comments at 17; Allegiance Reply at 7-8.

<sup>1210</sup> e.spire/Net.2000 Comments at 9 n.12 (citing In re Establishment of Rules to Prohibit the Imposition of Unjust, Onerous Termination Penalties on Customers Choosing to Partake of the Benefits of Local Exchange Telecommunications Competition, Petition for Declaratory Ruling, CC Docket No. 99-142 (filed Apr. 26, 1999) (requesting that the Commission declare unlawful termination penalties imposed by ILECs, to prohibit enforcement of ILEC termination penalties, and to require the removal of ILEC termination penalties from state tariffs until more competition develops)).

<sup>1211</sup> TRA Comments at 27 (citing *Bell South Louisiana Order*, 13 FCC Rcd at 6245).

<sup>1212</sup> TRA Comments at 27; see also *Local Competition First Report and Order*, 11 FCC Rcd at 15499.

telecommunications services available for resale at the tariff rates pursuant to section 251(c)(4), and it is making its ADSL telecommunications service that it offers to its own end user customers available for resale pursuant to section 251(c)(4).<sup>1213</sup> Bell Atlantic argues that its "wholesale ADSL offering is not a retail service, and therefore is not subject to section 251(c)(4)'s requirement to provide retail services at an avoided cost discount."<sup>1214</sup>

393. We have recently addressed this issue in *Deployment of Wireline Services Offering Advanced Telecommunications Capability*.<sup>1215</sup> In that proceeding, we found that, although DSL services designed for and sold to residential and business end-users are subject to the discounted resale obligations of section 251(c)(4), where the incumbent LEC offers DSL services as an input component to ISPs who combine the DSL service with their own Internet service, the discount resale obligations of section 251(c)(4) do not apply.<sup>1216</sup> Therefore, we agree with Bell Atlantic that it is not required to provide an avoided-cost discount on its wholesale ADSL offering because it is not a retail service subject to the discount obligations of section 251(c)(4).

394. *Other resale conditions and limitations.* We are also not persuaded by NALA's argument that Bell Atlantic has imposed an unreasonable condition on resale because it does not provide a flat-rate local service option for resale in New York City.<sup>1217</sup> According to NALA, Bell Atlantic offers only message-rate service in New York City.<sup>1218</sup> Thus, NALA maintains that prepaid local providers must block all services that could result in per-call or per-minute charges, including toll, operator services, information services, directory assistance, and directory assistance call completion, and this constitutes an unreasonable limitation on the services which NALA members can resell.<sup>1219</sup> We find NALA does not make a persuasive argument. As Bell Atlantic points out, it does not offer a flat-rate telephone service in New York City at retail to subscribers who are not telecommunications carriers,<sup>1220</sup> and therefore Bell Atlantic is under no obligation to provide such services for resale under the statute.<sup>1221</sup>

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<sup>1213</sup> Bell Atlantic Lacouture/Troy Joint Decl. at para. 169.

<sup>1214</sup> Bell Atlantic Reply at 31; Bell Atlantic Lacouture/Troy Reply Decl. at para. 170 (citing *Federal Communications Commission Adopts Rules Applicable to the Sale of High-Speed Internet Services*, News Release, CC Docket No. 98-147 (rel. Nov. 2, 1999)).

<sup>1215</sup> *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Second Report and Order, FCC 99-330 (rel. Nov. 9, 1999) (*Advanced Services Second Report and Order*).

<sup>1216</sup> *Advanced Services Second Report and Order* at para. 19.

<sup>1217</sup> NALA Comments at 2. See also ALTS Reply at 15-16.

<sup>1218</sup> NALA Comments at 3.

<sup>1219</sup> *Id.* at 2-3.

<sup>1220</sup> Bell Atlantic Reply at 31, Bell Atlantic Lacouture/Troy Reply Decl. at para. 172.

<sup>1221</sup> Similarly, Bell Atlantic states that if it offers flat-rate local telecommunications service in the future, Bell Atlantic will make it available for resale. Bell Atlantic Lacouture/Troy Reply Decl. at para. 172.

395. In addition, we reject CCA's argument that Bell Atlantic violates checklist item 14 because Bell Atlantic's resale tariff is highly restrictive, bundles services and prices, only allows resale of tariffed end-user services that have been designated by Bell Atlantic's retail marketing department, and does not offer some vertical products<sup>1222</sup> for resale.<sup>1223</sup> CCA argues that these limitations make it virtually impossible for a reseller to differentiate its service offering, since Bell Atlantic already has defined the retail products and services.<sup>1224</sup> CCA further argues that, as a result of Bell Atlantic's actions, resellers cannot meet the needs of the local telephone consumer and compete with Bell Atlantic.<sup>1225</sup>

396. As stated above, Bell Atlantic demonstrates that it offers for resale at wholesale rates any telecommunications services that it offers at retail to subscribers and pursuant to the discounts set by the New York Commission. Therefore, we are not persuaded by CCA's argument that Bell Atlantic violates checklist item 14 because its resale tariff is highly restrictive, bundles services and prices, and only allows resale of tariffed end-user services that have been designated by Bell Atlantic's retail marketing department.

397. In addition, based on the evidence in the record, we are unable to conclude that Bell Atlantic fails to make some vertical products available to resellers in violation of checklist item 14.<sup>1226</sup> Sections 251(c)(4) and 252(d)(3) of the Act and the Commission's rules do not require Bell Atlantic to provide its retail customers with all of the vertical products that Bell Atlantic is capable of providing. This does not mean, however, that Bell Atlantic may limit the vertical products that it makes available to competitive LECs. In the *Second BellSouth Louisiana Order*, the Commission required Bell South to provide unbundled local switching that included line-side and trunk-side facilities, plus the features, functions, and capabilities of the switch.<sup>1227</sup> The features, functions, and capabilities of the switch include the basic switching function as well as the same basic capabilities that are available to the incumbent LEC's customers.<sup>1228</sup> Additionally, local switching includes all vertical features that the switch is capable of providing, as well as any technically feasible customized routing functions.<sup>1229</sup> Bell Atlantic provides local and tandem switching unbundled from loops and other network components.<sup>1230</sup> Unbundled local switching is available as a line-side or a trunk-side port (shared

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<sup>1222</sup> Vertical features provide end-users with various services such as custom calling, call waiting, call forwarding, caller ID and Centrex. *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20726.

<sup>1223</sup> CCA Comments at 5-6. *See also* ALTS Reply at 14.

<sup>1224</sup> CCA Comments at 5.

<sup>1225</sup> *Id.* at 5-6.

<sup>1226</sup> *See also supra* Section V.F.

<sup>1227</sup> *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20722-24.

<sup>1228</sup> *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20722.

<sup>1229</sup> *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20722-23.

<sup>1230</sup> Bell Atlantic Lacouture/Troy Decl. at para. 90.



and dedicated) and includes all of the vertical features available to Bell Atlantic's retail customers on a line-by-line basis.<sup>1231</sup> Bell Atlantic states that it is prepared upon request to provide competitive LECs with access to other features resident in its switches that Bell Atlantic does not offer its retail customers.<sup>1232</sup> In situations where a competitive LEC seeks to resell vertical products that Bell Atlantic does not offer at retail to its subscribers, we find that Bell Atlantic complies with the resale obligations contained in checklist item 14 by providing competitive LECs with access to unbundled switching. We clarify that under these circumstances, the avoided cost discount under section 251(c)(4) does not apply because Bell Atlantic is not offering the vertical products at retail to its customers.

398. We also reject the claim of Destek, that Bell Atlantic Network Integration (BANI) and Bell Atlantic Digital Services (BADs) have associated themselves with state owned and operated universities in joint ventures through exclusive and anticompetitive, special contract interconnection agreements in New Hampshire.<sup>1233</sup> We find that Destek's argument does not pertain to Bell Atlantic's resale practices in New York and thus is not relevant to a determination of whether it meets checklist item 14 in this proceeding. Moreover, although Destek alleges that Bell Atlantic employs the same practices through out its service territories, it presents no evidence to support this claim with respect to Bell Atlantic's resale practices in New York.<sup>1234</sup>

399. Similarly, Ntegrity's argument that Bell Atlantic engages in anticompetitive practices in Pennsylvania, Maryland, and New Jersey is not relevant to a determination of whether Bell Atlantic meets checklist item 14 in New York.<sup>1235</sup>

### 3. Provisioning

400. *Provisioning.* Based on the evidence in the record, we find that Bell Atlantic satisfies the provisioning requirements of checklist item 14.<sup>1236</sup> As discussed *supra* Section V.B, Bell Atlantic is provisioning competitive LECs' orders for resale in substantially the same time and manner as for its retail customers. We are not persuaded by various claims that Bell Atlantic

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<sup>1231</sup> *Id.*

<sup>1232</sup> *Id.*

<sup>1233</sup> Destek Comments at 2-3, App. A. According to Destek, the interconnection agreements provides for the deployment of Asynchronous Transfer Mode (ATM) Cell Relay services that allow Bell Atlantic and the state owned institutions to provide information, data, real-time voice and video conferencing, voice communications, internet access, local and wide area networking and telecommunications services initially to K-12 schools, states and federal agencies, nonprofit organizations and ultimately to businesses throughout the service area.

<sup>1234</sup> Destek Comments at 3.

<sup>1235</sup> Ntegrity Comments at 1-3.

<sup>1236</sup> Bell Atlantic provides competitive LECs with retail telecommunications services available for resale under interconnection agreements and tariffs. Bell Atlantic Lacouture/Troy Decl. at paras. 84, 266. *See also* Bell Atlantic Application at 35-36; Bell Atlantic Lacouture/Troy Decl. At paras. 84-88, 265-279. Bell Atlantic's compliance is also supported by KPMG's findings. Bell Atlantic Application at 35; Bell Atlantic Lacouture/Troy Decl. at paras. 84, 267

fails to provision resale services in a nondiscriminatory manner. Commenters assert that occasionally Bell Atlantic: (a) continues to bill its former customers following their switch to a competing provider, resulting in the customer being double billed;<sup>1237</sup> (b) fails to activate toll blocks on competitors' orders;<sup>1238</sup> (c) misses appointments to connect service to new customers;<sup>1239</sup> (d) changes the phone number preassigned to a reseller's customer without any notification;<sup>1240</sup> and (e) does not process the requests by resale customers to change their Presubscribed Interexchange Carrier ("PIC") seamlessly, as it does for the requests of Bell Atlantic's own retail customers.<sup>1241</sup> Although we do not discount the effect of such occasional incidents on affected customers, the present record does not indicate that these are systemic problems. Were these widespread problems, they would appear to warrant a finding of noncompliance. We conclude, however, that these problems are insufficient to overcome Bell Atlantic's showing that it is in compliance with the provisioning requirements of this checklist item.

## VI. SECTION 272 COMPLIANCE

### A. Background

401. Section 271(d)(3)(B) requires that the Commission shall not approve a BOC's application to provide interLATA services unless the BOC demonstrates that the "requested authorization will be carried out in accordance with the requirements of section 272."<sup>1242</sup> The Commission set standards for compliance with section 272 in the *Accounting Safeguards Order* and the *Non-Accounting Safeguards Order*.<sup>1243</sup> Together, these safeguards discourage and facilitate the detection of improper cost allocation and cross-subsidization between the BOC and its section 272 affiliate.<sup>1244</sup> In addition, these safeguards ensure that BOCs do not discriminate in

<sup>1237</sup> Adelphia Comments, Aff. at para. 18; TRA Comments at 16-17.

<sup>1238</sup> NALA Comments at 5.

<sup>1239</sup> *Id.*

<sup>1240</sup> *Id.*

<sup>1241</sup> RCN Reply at 9. *See also* NALA Comments at 4; TRA Comments at 15.

<sup>1242</sup> 47 U.S.C. § 271(d)(3)(B).

<sup>1243</sup> *See Implementation of the Accounting Safeguards Under the Telecommunications Act of 1996*, CC Docket No. 96-150, Report and Order, 11 FCC Rcd 17539 (1996) (*Accounting Safeguards Order*), recon. pending. *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905 (1996) (*Non-Accounting Safeguards Order*), petition for review pending sub nom. *SBC Communications v. FCC*, No. 97-1118 (filed D.C. Cir. Mar. 6, 1997) (held in abeyance May 7, 1997), First Order on Reconsideration, 12 FCC Rcd 2297 (1997) (*First Order on Reconsideration*), Second Order on Reconsideration, 12 FCC Rcd 8653 (1997) (*Second Order on Reconsideration*), aff'd sub nom. *Bell Atlantic Telephone Companies v. FCC*, 131 F.3d 1044 (D.C. Cir. 1997), Third Order on Reconsideration, FCC 99-242 (rel. Oct. 4, 1999) (*Third Order on Reconsideration*).

<sup>1244</sup> *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21914; *Accounting Safeguards Order*, 11 FCC Rcd at 17550; *Ameritech Michigan Order*, 12 FCC Rcd at 20725.

favor of their section 272 affiliates.<sup>1245</sup>

402. As we stated in the *Ameritech Michigan Order*, compliance with section 272 is “of crucial importance” because the structural, transactional, and nondiscrimination safeguards of section 272 seek to ensure that BOCs compete on a level playing field.<sup>1246</sup> The Commission’s findings regarding section 272 compliance constitute independent grounds for denying an application.<sup>1247</sup> Past and present behavior of the BOC applicant provides “the best indicator of whether [the applicant] will carry out the requested authorization in compliance with section 272.”<sup>1248</sup>

## B. Discussion

403. Based on the record, we conclude that Bell Atlantic has demonstrated that it will comply with the requirements of section 272. We note that neither the New York Commission nor the Department of Justice addressed Bell Atlantic’s showing of section 272 compliance. We address each section 272 requirement below.

### 1. Structural, Transactional, and Accounting Requirements of Section 272

404. *Section 272(a) – Separate Affiliate.* Section 272(a) requires BOCs and their local exchange carrier affiliates that are subject to section 251(c) to provide certain competitive services through structurally separate affiliates.<sup>1249</sup> For the reasons described in the section below, we conclude that Bell Atlantic demonstrates that it will operate in accordance with section 272(a).

405. Bell Atlantic has established three section 272 affiliates to provide in-region interLATA services upon gaining section 271 approval: Bell Atlantic Communications, Inc. (BACI), NYNEX Long Distance (NLD), and Bell Atlantic Global Networks, Inc. (BAGNI).<sup>1250</sup> Each affiliate is a wholly-owned subsidiary of Bell Atlantic Corporation, and each is

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<sup>1245</sup> *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21914; *Ameritech Michigan Order*, 12 FCC Rcd at 20725.

<sup>1246</sup> *Ameritech Michigan Order*, 12 FCC Rcd at 20725; see AT&T Comments at 64; ALTS Comments at 69; CERB Comments at 5-6; CloseCall Comments at 8.

<sup>1247</sup> *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20785-86.

<sup>1248</sup> *Id.*

<sup>1249</sup> Section 272(a) states that a BOC may not provide certain services except through one or more affiliates that meet the requirements of section 272(b). See 47 U.S.C. § 272(a)(1)(B).

<sup>1250</sup> Bell Atlantic Application App. A, Vol. 1, Tab 5, Declaration of Maureen C. Breen at paras. 1-3 (Bell Atlantic Breen Decl.); Bell Atlantic Application App. A, Vol. 1, Tab 6, Declaration of Stewart Verge at paras. 2-3 (Bell Atlantic Verge Decl.); Bell Atlantic Application App. A, Vol. 1, Tab 7, Declaration of Susan C. Browning at paras. 4-6 (Bell Atlantic Browning Decl.). For an organizational chart, see Bell Atlantic Browning Decl. Attach. P at 12 (showing Bell Atlantic section 272 affiliates, operating telephone companies, and service organizations).

incorporated in Delaware.<sup>1251</sup> Bell Atlantic plans to offer interLATA services to residential consumers through BACI, and to serve business customers through NLD. Both BACI and NLD will conduct business under the trade name "Bell Atlantic Long Distance."<sup>1252</sup> One affiliate, BAGNI, will build a telecommunications network and serve BACI and NLD. Bell Atlantic demonstrates that each affiliate has implemented internal control mechanisms to prevent, as well as detect and correct, any noncompliance with section 272.<sup>1253</sup>

406. *Section 272(b)(1) – Operate Independently.* Based on the evidence in the record, Bell Atlantic has demonstrated that it will comply with section 272(b)(1), which requires a section 272 affiliate to "operate independently from the Bell operating company."<sup>1254</sup> The Commission has interpreted the "operate independently" requirement to impose four important restrictions on the ownership and operations of a BOC and its section 272 affiliate: (1) no joint ownership of switching and transmission facilities; (2) no joint ownership of the land and buildings on which switching and transmission facilities are located; (3) no provision by the BOC (or other non-section 272 affiliate) of operation, installation, and maintenance services (OI&M) with respect to the section 272 affiliate's facilities; and (4) no provision of OI&M by the section 272 affiliate with respect to the BOC's facilities.<sup>1255</sup>

407. We disagree with AT&T's contentions that the disclosures Bell Atlantic makes on the Internet pursuant to section 272(b)(5) reveal the provisioning of proscribed OI&M services by a Bell Atlantic BOC to a section 272 affiliate.<sup>1256</sup> Bell Atlantic explains that the services noted by AT&T were construction services that do not involve installation or servicing telecommunications equipment.<sup>1257</sup> Our review of Bell Atlantic's Internet postings, its cost allocation manual (CAM), and its independent auditor's reports support Bell Atlantic's

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<sup>1251</sup> Bell Atlantic Breen Decl. at para. 4, Attach. A (submitting articles of incorporation for BACI and NLD); Bell Atlantic Verge Decl. at para. 4, Attach. A (submitting articles of incorporation for BAGNI).

<sup>1252</sup> Bell Atlantic Browning Decl. Attach. E & P.

<sup>1253</sup> Bell Atlantic Application at 54 (citing Bell Atlantic Browning Decl. at paras. 30-34; Bell Atlantic Breen Decl. at paras. 18-24; Bell Atlantic Verge Decl. at paras. 20-26). Among its internal control mechanisms are a corporate compliance program, corporate-wide supervision of affiliate relationships, and periodic employee training. See Bell Atlantic Browning Decl. Attach. E.

<sup>1254</sup> 47 U.S.C. § 272(b)(1); see also *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21981-87; *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20787-88; see Bell Atlantic Application at 49-50, 54-55 (describing internal control structure); Bell Atlantic Browning Decl. at para. 8(b)-8(c); Bell Atlantic Breen Decl. at paras. 11 (stating that BACI and NLD own neither domestic telecommunications facilities nor related land and buildings), 13 (stating that BACI and NLD do not jointly own switching and transmission facilities or related land and buildings); Bell Atlantic Verge Decl. at para. 10 (stating that BAGNI will operate, install, and maintain its own network either directly or by contracting with unaffiliated third parties).

<sup>1255</sup> 47 C.F.R. §§ 53.203(a)-203(c); see *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21981-82; see also *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20787.

<sup>1256</sup> AT&T Comments at 67-68; AT&T Kargoll Aff. at paras. 24-26 (submitting Bell Atlantic Internet disclosures).

<sup>1257</sup> Bell Atlantic Reply at 43-44.

explanation.<sup>1258</sup> The Internet disclosures referenced by AT&T refer to certain types of employees and the rates at which such employees were billed to Bell Atlantic's section 272 affiliates. Reading this information in context, it is clear that the employees referenced in the Internet disclosures are not telecommunications technicians and engineers performing OI&M services.<sup>1259</sup>

408. *Section 272(b)(2) – Books, Records, and Accounts.* Based on the evidence in the record, Bell Atlantic demonstrates that it will comply with the requirement that its section 272 affiliates "shall maintain books, records, and accounts in a manner prescribed by the Commission which shall be separate from the books, records, and accounts maintained by the [BOCs]."<sup>1260</sup> We note that no party challenges Bell Atlantic's showing.

409. *Section 272(b)(3) – Separate Officers, Directors, and Employees.* Based on the evidence in the record, Bell Atlantic has demonstrated that it will comply with the "separate officers, directors, and employees" requirement of section 272(b)(3).<sup>1261</sup> We note that no party challenges Bell Atlantic's showing.

410. *Section 272(b)(4) – Credit Arrangements.* Based on the evidence in the record, Bell Atlantic has demonstrated that it will comply with section 272(b)(4), which prevents a section 272 affiliate from obtaining "credit under any arrangement that would permit a creditor, upon default, to have recourse to the assets of [any Bell Atlantic BOC]."<sup>1262</sup> We note that no party challenges Bell Atlantic's showing.

411. *Section 272(b)(5) – Affiliate Transactions.* Based on our review of its application, we conclude that Bell Atlantic demonstrates that it will comply with the public disclosure requirements of section 272(b)(5) for transactions between its BOCs and its section 272

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<sup>1258</sup> See Letter from Gerald Asch, Director, Federal Regulatory Affairs, Bell Atlantic Corp., to Anthony Dale, Attorney, Federal Communications Commission, CC Docket No. 99-295 (filed Oct. 19, 1999) (Bell Atlantic Oct. 19 *Ex Parte* Letter).

<sup>1259</sup> See AT&T Kargoll Aff. Attach. 2; Bell Atlantic Reply Decl. at paras. 5-7.

<sup>1260</sup> 47 U.S.C. § 272(b)(2); 47 C.F.R. § 53.203(b); *Accounting Safeguards Order*, 11 FCC Rcd at 17617-18; *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20786-89; see Bell Atlantic Breen Decl. at para. 6 & Attach. E (submitting corporate accounting policy); Bell Atlantic Verge Decl. at para. 6 & Attach. D.

<sup>1261</sup> 47 U.S.C. § 272(b)(3); 47 C.F.R. § 53.203(c); *Ameritech Michigan Order*, 12 FCC Rcd at 20730-31; *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20789-90; see Bell Atlantic Browning Decl. at paras. 3(a), 3(b) (stating that Bell Atlantic compared payroll registers of the section 272 affiliates to the records for the operating telephone companies); Bell Atlantic Breen Decl. at para. 5, Attach. B (presenting list of corporate directors), C (presenting list of corporate officers); Bell Atlantic Verge Decl. at para. 5, Attach. B & C.

<sup>1262</sup> 47 U.S.C. § 272(b)(4); 47 C.F.R. § 53.203(d); *Non-Accounting Safeguards Order* at paras. 189-90; see Bell Atlantic Application at 50; Bell Atlantic Browning Decl. at para. 11; Bell Atlantic Breen Decl. at paras. 7-8, Attach. F (submitting support agreement between holding company and nonregulated lending affiliate), G (submitting promissory note for BACI), H (submitting promissory note for NLD); Bell Atlantic Verge Decl. at 7, Attach. E (submitting promissory note for BAGNI).

affiliates.<sup>1263</sup> Section 272(b)(5) requires that a section 272 affiliate conduct all transactions with its affiliated BOCs on an arm's length basis.<sup>1264</sup> In addition, the statute requires section 272 affiliates to reduce all such transactions to writing and make them available for public inspection.<sup>1265</sup> Consistent with the Commission's *Accounting Safeguards Order*, Bell Atlantic must ensure that all transactions between its section 272 affiliates (i.e., BACI, NLD, and BAGNI) and any affiliated BOC are posted on the company's Internet homepage within 10 days of the transaction.<sup>1266</sup> To ensure that all affiliate transactions occur at arm's length, Bell Atlantic must abide by the Commission's affiliate transactions rules.<sup>1267</sup> The Commission evaluates the sufficiency of a BOC's Internet disclosures by referring to its ARMIS filings, its cost allocation manuals, and the CAM audit workpapers.<sup>1268</sup>

412. AT&T argues that Bell Atlantic failed to post all transactions between its BOCs and its section 272 affiliates on the Internet, and that Bell Atlantic fails to provide sufficient detail of such transactions.<sup>1269</sup> Although we are concerned about the issues raised by AT&T, Bell Atlantic persuades us that it will comply with section 272(b)(5)'s public disclosure requirement.<sup>1270</sup> To the extent that AT&T's comments and our review of the record revealed minor discrepancies between Bell Atlantic's Internet postings and its regular accounting

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<sup>1263</sup> The Commission has rejected section 271 applications in part because BOCs failed to disclose fully all transactions in a manner consistent with section 272(b)(5) and the Commission's rules. See *Ameritech Michigan Order*, 12 FCC Rcd at 20734-37; *Second BellSouth Louisiana Order*, 13 FCC Rcd 20791-92.

<sup>1264</sup> 47 U.S.C. § 272(b)(5); 47 C.F.R. § 53.203(e).

<sup>1265</sup> Section 272(b)(5) states that the section 272 affiliate "shall conduct *all* transactions with the [BOC] of which it is an affiliate on an arm's length basis with *any such* transactions reduced to writing and available for public inspection." 47 U.S.C. § 272(b)(5) (emphasis added).

<sup>1266</sup> *Accounting Safeguards Order*, 11 FCC Rcd at 17593-94; *Ameritech Michigan Order*, 12 FCC Rcd at 20734-37; *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20790-95.

<sup>1267</sup> 47 C.F.R. § 32.27; *Accounting Safeguards Order*, 11 FCC Rcd at 17582-17; see *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20790-95. The Commission's affiliate transactions rules require BOCs to report transactions between regulated and nonregulated affiliates, and to value the cost of affiliate transactions in accordance with a hierarchy of valuation techniques.

<sup>1268</sup> Bell Atlantic Browning Decl. Attach. L; see *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20791-92. In their Automated Reporting Management Information System ("ARMIS") reports, the BOCs provide summary information about their transactions with nonregulated affiliates. See ARMIS 43-02 USOA Report, Tables I-2, B-4. In their CAMs, the BOCs disclose the nature, terms, and frequency of their anticipated affiliate transactions. See 47 C.F.R. § 64.903; see also Bell Atlantic Corp., COST ALLOCATION MANUAL § V (Dec. 1998). Pursuant to the Commission's Part 64 rules, all the BOCs receive annual audits of their ARMIS data conducted by an independent auditor. 47 C.F.R. § 64.904. In addition, the Commission regularly reviews the CAMs and the audit materials related to the independent audits, which show the actual amount of affiliate transactions that occurred in the audited period.

<sup>1269</sup> AT&T Kargoll Aff. at paras. 32-51; AT&T Nov. 8 *Ex Parte* Letter at 1-4.

<sup>1270</sup> See AT&T Comments at 69-70; AT&T Reply at 47-48. But see Bell Atlantic Reply at 44.

submissions,<sup>1271</sup> we find that Bell Atlantic has submitted satisfactory evidence to explain the inconsistencies.<sup>1272</sup> As Bell Atlantic points out, a variety of circumstances may result in minor differences between ARMIS and CAM disclosures and the section 272(b)(5) Internet postings.<sup>1273</sup> Furthermore, we find that the value of the posting discrepancies is small, totaling less than the amount of the discrepancies at issue in the *Second BellSouth Louisiana Order*.<sup>1274</sup> Given these factors, we conclude that these isolated instances are not sufficient to show systemic flaws in Bell Atlantic's ability to comply with section 272(b)(5). Finally, we note that Bell Atlantic's Internet postings will undergo a thorough and systematic review in the section 272(d) biennial audit, which will ensure that any failures to post are identified in time for appropriate remedial action.

413. We likewise reject AT&T's assertion that Bell Atlantic's Internet postings do not contain sufficient detail to show that Bell Atlantic will comply with section 272(b)(5).<sup>1275</sup> As required by the Commission's section 272(b)(5) rules, Bell Atlantic discloses "the number and type of personnel assigned to the project, the level of expertise of such personnel, any special equipment used to provide the service, and the length of time required to complete the transaction."<sup>1276</sup> Although we are concerned that some descriptions of affiliate transactions may contain ambiguous descriptions of services, we are persuaded that, on balance, Bell Atlantic's descriptions are sufficiently detailed to facilitate the purchasing decisions of unaffiliated third

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<sup>1271</sup> See Bell Atlantic Breen Decl. at para. 14 (citing <<http://www.callbell.com/regreqs2>> and [www.callbell.com/regreqs2/index.htm](http://www.callbell.com/regreqs2/index.htm)), Attach. I; Bell Atlantic Verge Decl. at paras 14-15 (citing <<http://www.bagn.com/regrequirements.html>>). The working papers of Bell Atlantic's independent auditors show that, in 1998, two Bell Atlantic BOCs provided approximately \$96,000 worth of data services and \$37,790 in voice messaging services to BACI; approximately \$69,000 in property management services to BAGNI; and approximately \$18,000 in real estate services to NLD. See, e.g., Bell Atlantic Corp., COST ALLOCATION MANUAL at App. V-1 (Dec. 1998) (identifying services provided by a Bell Atlantic BOC to its section 272 affiliates).

<sup>1272</sup> See Bell Atlantic Oct. 19 *Ex Parte* Letter.

<sup>1273</sup> See Bell Atlantic Browning Decl. Attach. L (explaining potential differences in dollar values of posted transactions); Browning Reply Decl. at 8-12, 14; see also Bell Atlantic Oct. 19 *Ex Parte* Letter. But see AT&T Reply at 47-48 (criticizing Bell Atlantic's explanations); Letter from Robert W. Quinn, Director – Federal Government Affairs, AT&T Corp., to Magalie Roman Salas, Secretary, Federal Communications Commission (filed Nov. 8, 1999) (AT&T Nov. 8 *Ex Parte* Letter).

<sup>1274</sup> The total value of the discrepancies between Bell Atlantic's Internet disclosures and its other accounting information amounts to approximately \$220,000. When compared to the total volume of affiliate transactions for all three affiliates combined, the discrepancies amount to less than one percent of the total dollar value. By comparison, in the *Second BellSouth Louisiana Order*, we found approximately \$610,000 worth of discrepancies between the BOC's Internet postings and its ARMIS data, which amounted to 7.3 percent of the total dollar value of transactions. *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20792 n.1046. In the *Second BellSouth Louisiana Order*, BellSouth failed to provide explanations regarding its discrepancies, while Bell Atlantic presented explanations in the instant proceeding. See Bell Atlantic October 19 *Ex Parte* Letter at 1-2 & Attach.

<sup>1275</sup> AT&T Kargoll Aff. at paras. 34-40.

<sup>1276</sup> *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20793-94; see *Accounting Safeguards Order*, 11 FCC Rcd at 17593-94; *Ameritech Michigan Order*, 12 FCC Rcd at 20735. According to its Internet postings, its CAM, and its ARMIS data, Bell Atlantic did not transfer any assets from a BOC to its section 272 affiliates in 1998.

parties.<sup>1277</sup> In addition, we find that Bell Atlantic has implemented the internal controls and processes needed to identify and correct potential problem areas with its Internet disclosures.<sup>1278</sup> We note that the section 272(d) biennial audit will ensure that Bell Atlantic continues to provide adequate descriptions of its posted transactions because inadequate descriptions will be identified by the Federal-State audit team, and disclosed in the subsequent audit report.<sup>1279</sup>

414. Based on the record evidence, we conclude that Bell Atlantic demonstrates that it will comply with the affiliate transactions rules, which is necessary to ensure that all transactions between a BOC and its section 272 affiliate occur at arm's length.<sup>1280</sup> We note that no party challenges Bell Atlantic's showing that it values transactions between its BOCs and its section 272 affiliates in accordance with our affiliate transactions rules.

415. *Section 272(c)(2) – Accounting Principles.* Based on the evidence in the record, Bell Atlantic demonstrates that its BOCs account for all transactions with its section 272 affiliates in accordance with the accounting principles designated or approved by the Commission.<sup>1281</sup> In the *Accounting Safeguards Order*, we concluded that complying with the Part 32 affiliate transactions rules satisfies the accounting requirements of section 272(c), which pertain to the BOC's "dealings" with its separate affiliate.<sup>1282</sup> We note that no party challenges Bell Atlantic's showing.

416. *Section 272(d) – Biennial Audit.* Based on the evidence in the record, we conclude that Bell Atlantic demonstrates that it will comply with section 272(d), which requires an independent audit of a BOC's compliance with section 272 after receiving interLATA authorization.<sup>1283</sup> Because the audit process involves a thorough and systematic evaluation into a BOC's compliance with section 272 and its affiliate relationships, we expect that the section 272(d) biennial audit will address the concerns raised by AARP, Closecall, and others for

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<sup>1277</sup> See, e.g., BACI Technical Services Agreement – New York, which is located on BACI's Internet site at: <<http://www.callbell.com/regreqs2/detail.cfm?ContractID=19>>.

<sup>1278</sup> See Bell Atlantic Breen Decl. Attach. I; Bell Atlantic Verge Decl. Attach. F; see also Bell Atlantic Browning Reply Decl. at paras. 8-12, 16.

<sup>1279</sup> See 47 U.S.C. § 272(d) (requiring a joint Federal-State audit of section 272 compliance conducted by an independent auditor).

<sup>1280</sup> *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20794-95; *Accounting Safeguards Order*, 11 FCC Rcd at 17592; 47 C.F.R. § 32.27; see Bell Atlantic Browning Decl. at paras. 22-25 & Attach. K-S (presenting various corporate policies and standard operating procedures pertaining to affiliate transactions compliance); Bell Atlantic Breen Decl. at paras. 14-17; Bell Atlantic Verge Decl. at paras. 14-19.

<sup>1281</sup> 47 U.S.C. § 272(c)(2); see Bell Atlantic Browning Decl. at paras. 22-26 & Attach. K (submitting reports of independent auditors), P (presenting employee training materials related to affiliate transaction compliance).

<sup>1282</sup> 47 C.F.R. § 32.27; *Accounting Safeguards Order*, 11 FCC Rcd at 17586-87; *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20785-86.

<sup>1283</sup> 47 U.S.C. § 272(d); see 47 C.F.R. §§ 53.209-213; see also *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20794; see Bell Atlantic Application at 52; Bell Atlantic Browning Decl. at para. 27 & Attach. P at 36-40 (describing internal controls related to the biennial audit).



stringent post-entry oversight of section 272 compliance.<sup>1284</sup>

## 2. Nondiscrimination Safeguards of Section 272

417. *Section 272(c)(1) – Nondiscrimination Safeguards.* Based on the evidence in the record, we conclude that Bell Atlantic demonstrates it will comply with section 272(c)(1), which prohibits a BOC from discriminating in favor of its section 272 affiliate in the “provision or procurement of goods, services, facilities, and information, or in the establishment of standards.”<sup>1285</sup> The Commission’s nondiscrimination safeguards require a BOC to, among other things, “provide to unaffiliated entities the same goods, services, facilities, and information that it provides to its section 272 affiliate at the same rates, terms, and conditions.”<sup>1286</sup> Although we agree with AT&T, CERB, and others regarding the broad nature of the nondiscrimination safeguards, we reject their contentions that Bell Atlantic fails to demonstrate compliance with the section 272(c)(1) nondiscrimination safeguards.<sup>1287</sup> As we noted with respect to section 272(b)(5) above, Bell Atlantic posts information about transactions between the BOC and its section 272 affiliates, and thereby provides unaffiliated entities with notice of opportunities to obtain the same goods, services, and facilities at the same rates, terms, and conditions available to the section 272 affiliate. We reject AT&T’s assertion that Bell Atlantic failed to show compliance with section 272(c)(1) because Bell Atlantic failed to provide unaffiliated third parties equal opportunities to lease real estate space.<sup>1288</sup> Bell Atlantic persuades us that, with respect to the leases for real estate raised by AT&T, it regularly advertises its real estate listings, and thereby provides unaffiliated third parties with opportunities to lease space provided to its section 272 affiliates.<sup>1289</sup>

418. *Section 272(e) – Fulfillment of Certain Requests.* Based on the evidence in the record, Bell Atlantic demonstrates that it will comply with section 272(e), which requires Bell Atlantic to fulfill requests for, among other things, telephone exchange and exchange access services from unaffiliated entities within the same time period Bell Atlantic fulfills such requests

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<sup>1284</sup> AARP Comments at 1; Closecall Comments at 8 (raising concerns about affiliate structure); ALTS Comments at 72; *see also* AT&T Reply at 47 (arguing that Bell Atlantic cannot evade its section 272 obligations by chaining transactions through its affiliates); AT&T Nov. 8 *Ex Parte* Letter at 2 (addressing risk of chain transactions).

<sup>1285</sup> 47 U.S.C. § 272(c)(1); *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21997-17; *Second BellSouth Louisiana Order*, 13 FCC Rcd 20796-800. The Commission found that the nondiscrimination safeguards extend to any good, service, facility, or information that a BOC provides to its section 272 affiliate, including administrative services and other non-telecommunications goods and services. *Non-Accounting Safeguards Order*, 11 FCC Rcd at 22003-04.

<sup>1286</sup> *Non-Accounting Safeguards Order*, 11 FCC Rcd at 22000-01.

<sup>1287</sup> ALTS Comments at 69-72; AT&T at 71-73; CERB at 2, 10; Letter from Kristine DeBry, Swidler Berlin Shereff Friedman, LLP, Counsel for CERB, to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket 99-295 (filed Nov. 8, 1999) (CERB Nov. 8 *Ex Parte* Letter).

<sup>1288</sup> AT&T Comments at 71-72.

<sup>1289</sup> Bell Atlantic Reply at 45; *see* AT&T Comments at 71-73.

for its own retail operations.<sup>1290</sup> In addition, section 272(e) also provides that a BOC “shall not provide any facilities, services, or information concerning its provision of exchange access to the [section 272 affiliate] unless such facilities, services, or information are made available to other providers of interLATA services in that market on the same terms and conditions.”<sup>1291</sup> Finally, section 272(e) places certain accounting and nondiscrimination requirements on BOCs with respect to exchange access and facilities or services provided to its interLATA affiliate.<sup>1292</sup> We note that no party challenges Bell Atlantic’s showing that it will comply with section 272(e).

### 3. Joint Marketing Requirements of Section 272

419. *Section 272(g)(1) – Affiliate Sales of Telephone Exchange Access Services.* Based on the evidence in the record, we conclude that Bell Atlantic has demonstrated that it will comply with the joint marketing provisions of section 272(g)(1).<sup>1293</sup> We reject as inconsistent with Commission precedent AT&T’s contention that Bell Atlantic must submit proposed marketing scripts in order to demonstrate compliance with section 272(g).<sup>1294</sup> Although Bell Atlantic makes no assertions regarding the plans of one section 272 affiliate, BAGNI, to market or sell Bell Atlantic telephone exchange services, we conclude that BAGNI’s evidence of a corporate compliance program<sup>1295</sup> and BAGNI’s assertions that it plans to provide service only to BACI and NLD<sup>1296</sup> adequately persuade us that Bell Atlantic will operate in accordance with section 272(g)(1) for BAGNI.

420. We decline to adopt the suggestion of Excel to impose conditions on Bell Atlantic

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<sup>1290</sup> 47 U.S.C. § 272(e)(1); *Non-Accounting Safeguards Order*, 11 FCC Rcd at 22018-22; *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20800-01; see Bell Atlantic Application at 52-53; Bell Atlantic Browning Decl. at para. 17(d) (citing Bell Atlantic FCC Tariff No. 1, Bell Atlantic FCC Tariff No. 11, NYPSC Tariff No. 918, NYPSC Tariff No. 900). Bell Atlantic demonstrates that it will provide accurate data regarding actual service intervals so that unaffiliated parties can evaluate the performance Bell Atlantic provides itself and its affiliates and compare such performance to the service quality Bell Atlantic provides to competing carriers. Bell Atlantic Browning Decl. at para. 17(e), Attach J; see *id.* at para. 18(a) (showing data that can be used to evaluate whether Bell Atlantic meets its nondiscrimination obligations). Bell Atlantic likewise addresses the accounting requirements of section 272(e) in its application. See Bell Atlantic Browning Decl. at para. 19(a) (addressing accounting for amounts charged for access to telephone exchange and exchange access); Bell Atlantic Breen Decl. at paras. 14, 16; Bell Atlantic Verge Decl. at paras. 17-18.

<sup>1291</sup> 47 U.S.C. § 272(e)(2).

<sup>1292</sup> 47 U.S.C. §§ 272(e)(3), (e)(4); *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20802-03; see Bell Atlantic Application at 53; Bell Atlantic Application at 53; Bell Atlantic Browning Decl. at paras. 19(a), 20; Bell Atlantic Breen Decl. at paras. 14-16; Bell Atlantic Verge Decl. at paras. 17-18.

<sup>1293</sup> Bell Atlantic Application at 54; Bell Atlantic Browning Decl. at para. 21, Attachment P, 21, 27 (submitting portions of employee training materials); see also Bell Atlantic Verge Decl. at paras. 20-26 (describing corporate compliance program); Bell Atlantic Breen Decl. at para. 15; Bell Atlantic Reply at 46-47.

<sup>1294</sup> AT&T Comments at 73-77; AT&T Reply at 48-49; *BellSouth South Carolina Order*, 13 FCC Rcd at 668.

<sup>1295</sup> Bell Atlantic Verge Decl. at paras. 21-26.

<sup>1296</sup> See *id.* at para. 2.

that would limit the ability of its section 272 affiliates to resell Bell Atlantic's local exchange service.<sup>1297</sup> Specifically, Excel requests that the Commission require Bell Atlantic either to forego the use of total service resale or to provide a greater discount for total service resale packages provided to competing carriers in New York.<sup>1298</sup> As we recently noted in the *Non-Accounting Safeguards* proceeding, section 272 does not prohibit a section 272 affiliate from providing both local exchange and interLATA services.<sup>1299</sup> We conclude that the need for restrictions on the ability of Bell Atlantic's section 272 affiliate to provide local service is unnecessary at this time, and that the existing section 272 safeguards adequately address the concerns raised by Excel.

421. *Section 272(g)(2) – Bell Operating Company Sales of Affiliate Services.* We conclude that Bell Atlantic demonstrates that it will comply with section 272(g)(2), which prevents a BOC from marketing or selling within its region any interLATA service provided by a section 272 affiliate absent authorization obtained pursuant to section 271(d).<sup>1300</sup> We note that no party challenges Bell Atlantic's assertions or provides evidence to rebut Bell Atlantic's showing.

## VII. PUBLIC INTEREST ANALYSIS

### A. Overview

422. In addition to determining whether a BOC satisfies the competitive checklist and will comply with section 272, Congress directed the Commission to assess whether the requested authorization would be consistent with the public interest, convenience, and necessity.<sup>1301</sup> We conclude that approval of this application is consistent with the public interest. In reaching this determination, we find that compliance with the competitive checklist is, itself, a strong indicator that long distance entry is consistent with the public interest. This approach reflects the Commission's many years of experience with the consumer benefits which flow from competition in telecommunications markets.

423. Nonetheless, the public interest analysis is an independent element of the statutory checklist and, under normal canons of statutory construction, requires an independent

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<sup>1297</sup> Excel Comments at 6-13.

<sup>1298</sup> *Id.* at 7.

<sup>1299</sup> *Non-Accounting Safeguards Third Order on Reconsideration*, FCC 99-242, paras. 22-24; *see also Non-Accounting Safeguards Order*, 11 FCC Rcd at 22055-56.

<sup>1300</sup> 47 U.S.C. § 272(g)(2); *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20804; Bell Atlantic Application at 54; Bell Atlantic Browning Decl. at para. 21 & Attach. P at 21, 27 (submitting portions of employee training materials); *see also* Verge Decl. at paras. 20-26 (describing corporate compliance program); Bell Atlantic Breen Decl. at para. 15; Bell Atlantic Reply at 46-47.

<sup>1301</sup> 47 U.S.C. § 271(d)(3)(C). The Commission has offered direction for the benefit of section 271 applicants relating to the meaning and scope of the public interest inquiry. *See generally Second BellSouth Louisiana Order*, 13 FCC Rcd at 20805-08; *Ameritech Michigan Order*, 12 FCC Rcd at 20741-51.

determination.<sup>1302</sup> Thus, we view the public interest requirement as an opportunity to review the circumstances presented by the application to ensure that no other relevant factors exist that would frustrate the congressional intent that markets be open, as required by the competitive checklist, and that entry will therefore serve the public interest as Congress expected. Among other things, we may review the local and long distance markets to ensure that there are not unusual circumstances that would make entry contrary to the public interest under the particular circumstances of this application.<sup>1303</sup> Another factor that could be relevant to our analysis is whether we have sufficient assurance that markets will remain open after grant of the application. While no one factor is dispositive in this analysis, our overriding goal is to ensure that nothing undermines our conclusion, based on our analysis of checklist compliance, that markets are open to competition. As discussed below, we conclude that the public interest would be met by grant of this application.

424. Finally, we note that a strong public interest showing can not overcome a failure to demonstrate compliance with one or more checklist items. The Commission is specifically barred from "limit[ing] . . . the terms used in the competitive checklist,"<sup>1304</sup> or forbearing from requiring compliance with all statutory conditions under section 271.<sup>1305</sup>

#### **B. Competition in Local Exchange and Long Distance Markets**

425. As set forth below, we conclude that approval of this application is consistent with promoting competition in the local and long distance telecommunications markets.

##### **1. Impact on Local Competition**

426. Consistent with our extensive review of the competitive checklist, which embodies the critical elements of market entry under the Act, we find that barriers to competitive entry in the local market have been removed and the local exchange market today is open to competition. We disagree with commenters' arguments that the public interest would be disserved by granting Bell Atlantic's application because the local market in New York has not yet truly been opened to competition.<sup>1306</sup> Commenters cite an array of evidence which, they argue, demonstrates that the local telecommunications market is not open and that competition has not sufficiently taken hold in New York. For example, commenters point to: the low

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<sup>1302</sup> In addition, Congress specifically rejected an amendment that would have stipulated that full implementation of the checklist necessarily satisfies the public interest criterion. See *Ameritech Michigan Order*, 12 FCC Rcd at 20747; see also 141 Cong. Rec. S7971, S8043 (Jun. 8, 1995).

<sup>1303</sup> See *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20805-06 (the public interest analysis may include consideration of "whether approval . . . will foster competition in all relevant telecommunications markets").

<sup>1304</sup> 47 U.S.C. § 271(d)(4).

<sup>1305</sup> 47 U.S.C. § 160(d).

<sup>1306</sup> See, e.g., AT&T Comments at 78-84, 94-100; MCI WorldCom Comments at 43-45; CPI Comments at 5-19.

percentage of total access lines served by competitive LECs;<sup>1307</sup> the concentration of competition in New York City and other urban areas;<sup>1308</sup> minimal competition for residential services;<sup>1309</sup> modest facilities-based investment;<sup>1310</sup> and prices for local exchange service at the maximum permissible levels under the price caps.<sup>1311</sup>

427. Congress specifically declined to adopt a market share or other similar test for BOC entry into long distance, and we have no intention of establishing one here.<sup>1312</sup> Moreover, pursuant to section 271(c)(2)(B), the Act provides for long distance entry even where there is no facilities-based competition satisfying section 271(c)(1)(A). This underscores Congress' desire to condition approval solely on whether the applicant has opened the door for local entry through full checklist compliance, not on whether competing LECs actually take advantage of the opportunity to enter the market. Although evidence of the type cited by commenters could result from checklist non-compliance or continuing barriers to entry in some circumstances, we have not found this to be the case here. Indeed, commenters do not link these market facts to any sin of omission or commission by Bell Atlantic. We have found nothing in the record to indicate, for example, that the limited competition outside of Manhattan is attributable to a refusal to provide collocation requests outside of Manhattan, or the provision of inferior OSS to competitive carriers upstate. Moreover, while competition for residential end users has proceeded less rapidly than competition for high-volume business end users, we have found that Bell Atlantic has satisfied its statutory obligations and made competitive entry possible in this market sector. Accordingly, we conclude that these indicators do not undermine Bell Atlantic's showing that it has complied with the competitive checklist.

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<sup>1307</sup> See AT&T Comments at 79-80; AT&T Kelley Aff. at paras. 2-3, 14-33; AT&T Hubbard/Lehr Aff. at para 54 and Attach. 13; CPI Comments at 10-16; KMC Comments at 11; MCI WorldCom Comments at 44; NY Attorney General Comments at 8.

<sup>1308</sup> While Bell Atlantic has offered evidence that it has lost large numbers of access lines to competitors, we recognize that competition may be slender as a percentage of access lines controlled by Bell Atlantic, particularly outside of urban areas. See AT&T Comments at 79-80; KMC Comments at 10; MCI WorldCom Comments at 44; MCI WorldCom Beard/Mayo Decl. at paras. 35-41.

<sup>1309</sup> See ALTS Comments at 68; CPI Comments at 3-5, 10-20; CPI Reply at 2-3; KMC Comments at 11; NY Attorney General Comments at 7-9; TRA Comments at 28-29.

<sup>1310</sup> See AT&T Kelley Decl. at paras. 24-32; MCI WorldCom Comments at 44; MCI WorldCom Beard/Mayo Decl. at para. 37; see also Department of Justice Evaluation at 10 ("[g]iven the extent of facilities-based entry in metropolitan New York and other cities in upstate New York, we have no substantial concerns about the ability of facilities-based carriers to enter the market").

<sup>1311</sup> See AT&T Comments at 80-81; AT&T Bernheim/Ordovery/Willig Aff. at paras. 35-36; AT&T Hubbard/Lehr Aff. at paras. 57-64.

<sup>1312</sup> This is consistent with the Commission's approach in prior section 271 orders. See *Ameritech Michigan Order*, 12 FCC Rcd at 20585; see also BellSouth Reply at 19. For similar reasons, we decline to require Bell Atlantic to demonstrate, as urged by CPI, that all end users in New York have a "realistic choice" between facilities-based local carriers. See CPI Comments at 10-20.

## 2. Impact on Long Distance Competition

428. We find that the record confirms our view that BOC entry into the long distance market will benefit consumers and competition if the relevant local exchange market is open to competition consistent with the competitive checklist. As a general matter, we believe that additional competition in telecommunications markets will enhance the public interest. Absent checklist compliance, grant of section 271 authority could potentially harm the long distance market because the BOC would have a unique ability to introduce vertical service packages (*i.e.*, long distance and other telecommunications services bundled with local exchange service). This is not the case here – we find that the local market is open and determine that reasonable assurances exist that the market will remain open. We will not require Bell Atlantic to make a substantial *additional* showing that its participation in the long distance market will produce public interest benefits. We thus decline to address directly the comments and economic studies submitted by Bell Atlantic and by parties opposing Bell Atlantic's application, which seek to demonstrate alternately that Bell Atlantic's entry will have a positive, or a negative, impact on competition in the long distance market.<sup>1313</sup>

### C. Assurance of Future Compliance

429. As set forth below, we find that the performance monitoring and enforcement mechanisms in place in New York, in combination with other factors, provide strong assurance that the local market will remain open after Bell Atlantic receives section 271 authorization. The Commission previously has explained that one factor it may consider as part of its public interest analysis is whether a BOC would continue to satisfy the requirements of section 271 after entering the long distance market.<sup>1314</sup> The standard of review employed by the Department of Justice in evaluating Bell Atlantic's application – whether the local market is fully and *irreversibly* open – also supports this approach.<sup>1315</sup> Although the Commission strongly encourages state performance monitoring and post-entry enforcement, we have never required BOC applicants to demonstrate that they are subject to such mechanisms as a condition of section 271 approval.<sup>1316</sup> The Commission has, however, stated that the fact that a BOC will be subject to performance monitoring and enforcement mechanisms would constitute probative evidence that the BOC will continue to meet its section 271 obligations and that its entry would

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<sup>1313</sup> See generally AT&T Hubbard/Lehr Aff. at paras. 28-136; AT&T Bernheim/Ordovery/Willig Aff. at paras. 99-171; AT&T Selwyn Aff. at paras. 4-35; MCI WorldCom Beard/Mayo Decl., Attach. 3; Bell Atlantic Taylor Decl. at paras. 1-78; Bell Atlantic MacAvoy Decl. at paras. 1-122.

<sup>1314</sup> See *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20806; see *Ameritech Michigan Order*, 12 FCC Rcd at 20747.

<sup>1315</sup> See Department of Justice Evaluation at 7, Schwartz Aff. at paras. 149-192.

<sup>1316</sup> These mechanisms are generally administered by state commissions and derive from authority the states have under state law or under the federal Act. As such, these mechanisms can serve as critical complements to the Commission's authority to preserve checklist compliance pursuant to section 271(d)(6). Moreover, in this instance, we find that the extensive collaborative process by which these mechanisms were developed and modified in New York has, itself, helped to bring Bell Atlantic into checklist compliance.

be consistent with the public interest.<sup>1317</sup>

430. We also believe that it is important to evaluate the benefits of these reporting and enforcement mechanisms in the context of other regulatory and legal processes that provide additional positive incentives to Bell Atlantic. It is not necessary that the state mechanisms alone provide full protection against potential anti-competitive behavior by the incumbent. Most significantly, we recognize that the Commission's enforcement authority under section 271(d)(6) already provides incentives for Bell Atlantic to ensure continuing compliance with its section 271 obligations.<sup>1318</sup> We also recognize that Bell Atlantic may be subject to payment of liquidated damages through many of its individual interconnection agreements with competitive carriers.<sup>1319</sup> Furthermore, Bell Atlantic risks liability through antitrust and other private causes of action if it performs in an unlawfully discriminatory manner.<sup>1320</sup>

### 1. Summary of Performance Reporting and Enforcement Mechanisms

431. The New York Commission has ordered Bell Atlantic to report performance data, on a monthly basis, pursuant to a series of 152 measurements or metrics.<sup>1321</sup> These measurements were developed through the "Carrier-to-Carrier Service Quality" proceeding before the New York Commission, and cover Bell Atlantic's performance on key functions essential to an open, competitive local market: pre-ordering, ordering, provisioning, maintenance and repair, network performance (interconnection trunks), collocation, billing and operator services. Associated with most of these measurements are standards – either benchmarks or retail analogs – also developed through the Carrier-to-Carrier proceeding.<sup>1322</sup>

432. The New York Commission also has required Bell Atlantic to submit to a comprehensive performance enforcement mechanism upon receiving authorization to provide interLATA services under section 271.<sup>1323</sup> The Amended Performance Assurance Plan

<sup>1317</sup> See *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20806.

<sup>1318</sup> See *infra* Section VIII.

<sup>1319</sup> See Bell Atlantic Application at 71; Bell Atlantic Dowell/Canny Decl. at paras. 8, 125, and Attach. A; AT&T Comments at 94 (recognizing that 32 of Bell Atlantic's 85 interconnection agreements contain liquidated damages provisions).

<sup>1320</sup> See Bell Atlantic Application at 71 (recognizing that competitive carriers could seek "private remedies under generally applicable statutes, including the treble-damages remedy of the federal antitrust laws").

<sup>1321</sup> See *NYPSC Guidelines Order*; see also *NYPSC Permanent Rule Order*.

<sup>1322</sup> The New York Commission explained that, wherever possible, it established "parity" standards (a performance level which is the same for competitors as it is for Bell Atlantic's retail operations). See *NYPSC Guidelines Order* at 2. For wholesale functions that do not have retail analogues, the New York Commission established absolute standards, usually a fixed percentage or a fixed period of time. *Id.*

<sup>1323</sup> Although the enforcement plans were formally adopted by the New York Commission on November 3, 1999, see *Order Adopting the Amended Performance Assurance Plan and Amended Change Control Plan*, Case Nos. 97-C-0271 and 99-C-0949 at 32 (NYPSC Nov. 3, 1999) (Bell Atlantic Dowell/Canny Reply Decl., Att. A) (*NYPSC Enforcement Plan Order*), we disagree with commenters who suggest that, consistent with our policy of requiring that applications be final when filed, we may not consider these plans in our public interest analysis. See, e.g.,

("APAP"), along with the Amended Change Control Assurance Plan ("ACCAP") (collectively, the "enforcement mechanism" or the "enforcement plan"), establish an automatic process under which affected competitors receive bill credits in the event Bell Atlantic fails to satisfy pre-determined performance standards on a set of 122 performance measures – essentially a sub-set of the Carrier-to-Carrier reporting metrics. The procedures and requirements of the Plan are described generally in Bell Atlantic's application and in detail in submissions made to the New York Commission.<sup>1324</sup>

## 2. Key Elements of the Enforcement Plan

433. Where, as here, a BOC relies on performance monitoring and enforcement mechanisms to provide assurance that it will continue to maintain market-opening performance after receiving section 271 authorization, we will review the mechanisms involved to ensure that they are likely to perform as promised.<sup>1325</sup> While the details of such mechanisms developed at the state level may vary widely, we believe that we should examine certain key aspects of these plans to determine whether they fall within a zone of reasonableness, and are likely to provide incentives that are sufficient to foster post-entry checklist compliance. In this instance, we believe that the enforcement mechanisms developed in New York will be effective in practice.<sup>1326</sup> We base this predictive judgment on the fact that the plan has the following important

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CoreComm Comments at 10; Sprint Comments at 24; AT&T Motion to Strike at 7; *see also* NY Attorney General Comments at 36. These plans were developed through a 16 month process in New York and were submitted to the New York Commission for adoption on September 24, 1999. We take administrative notice of the fact that the plans were adopted virtually unchanged by the New York Commission. *See* AT&T Reply Comments at 38. What is critical to our analysis is that the plans were described in detail in Bell Atlantic's initial application, and have been subject to extensive comment in this proceeding. Because this aspect of our public interest inquiry necessarily is forward-looking and requires a predictive judgment, this is a situation where it is appropriate to consider commitments made by the applicant to be subject to a framework in the future. Accordingly, this is different from our checklist analysis in which we assess present or past compliance by an applicant.

<sup>1324</sup> *See* Bell Atlantic Application at 67-71; Bell Atlantic Dowell/Canny Decl., App. A, Vol. 3, Attach. C (Petition for Approval of the Amended Performance Assurance Plan and Amended Change Control Assurance Plan for Bell Atlantic-New York, NYPSC Cases 97-C-0271 and 99-C-0949 (Sept. 24, 1999)); *see also* NYPSC *Enforcement Plan Order* at 3-6; New York Commission Comments at 164-172.

<sup>1325</sup> As is clear from our discussion of the checklist requirements, we do not base our decision that the checklist has been satisfied on the existence of the New York performance plans. We thus approach our analysis of the New York performance monitoring and enforcement mechanisms from a different angle than the Department of Justice. While we conclude that the checklist has been met, and assess the predicted impact of these monitoring and enforcement mechanisms on Bell Atlantic's ability to *maintain* compliance with section 271, the Department of Justice has assessed whether these mechanisms will be sufficient to "ensure the rapid *completion* of necessary market-opening measures." Department of Justice Evaluation at 37 (emphasis added), and Schwartz Aff. at paras. 137-140.

<sup>1326</sup> Our examination of the New York performance monitoring and enforcement mechanisms is solely for the purpose of determining whether the risk of post-approval non-compliance is sufficiently great that approval of its section 271 application would not be in the public interest. Our analysis has no bearing on the separate question of how the Commission would view and respond to any particular conduct by Bell Atlantic in the *federal* enforcement context.



characteristics:

- potential liability that provides a meaningful and significant incentive to comply with the designated performance standards;
- clearly-articulated, pre-determined measures and standards, which encompass a comprehensive range of carrier-to-carrier performance;
- a reasonable structure that is designed to detect and sanction poor performance when it occurs;
- a self-executing mechanism that does not leave the door open unreasonably to litigation and appeal;
- and reasonable assurances that the reported data is accurate.

434. Parties to this proceeding have identified numerous criticisms relating to the structure and methodologies of these monitoring and enforcement mechanisms, and suggest a long list of possible improvements. None of these criticisms, however, are sufficient to cause us to conclude that the plan will fail to foster post-entry compliance with the checklist requirements.<sup>1327</sup> We address each of the major challenges to these plans briefly below.

435. *Total Liability At Risk.* We conclude that the total of \$269 million in potential bill credits placed at risk, on an annual basis, under all components of the performance plans represents a meaningful incentive for Bell Atlantic to maintain a high level of performance.<sup>1328</sup> We thus disagree with commenters who suggest that \$269 million is insufficient and fails to provide adequate assurance of Bell Atlantic's compliance in the future.<sup>1329</sup> Most fundamentally, we disagree with a basic assumption made by several commenters: that liability under the Plan must be sufficient, *standing alone*, to completely counterbalance Bell Atlantic's incentive to discriminate.<sup>1330</sup> The performance plans adopted by the New York Commission do not represent

<sup>1327</sup> Several parties also urge us to adopt, in the context of this section 271 application, automatic "federal" remedies, in addition to those developed in New York. See Allegiance Comments at 14-17; ALTS Comments at 79; AT&T Reply at 39; Comptel Comments at 47-57; e.spire/Net2000 Comments at 24-25; MCI WorldCom Reply at 30; MediaOne Reply at 17. As discussed more fully below, see *infra* Section VIII, we fully intend to enforce the provisions of section 271 using the enforcement tools set forth in the Communications Act.

<sup>1328</sup> See NYPSC Enforcement Plan Order at 2, 17; Bell Atlantic Application at 69. We reach this number by adding the following components: \$75 million (MOE); \$75 million (MOE "doubling" provisions); \$75 million (Critical Measures); \$34 million (Special Provisions); and \$10 million (ACCAP).

<sup>1329</sup> See AT&T Comments at 87-88; ALTS Comments at 79; ChoiceOne Comments at 12; CoreComm Comments at 10-11; CPI Comments at 22-23; Focal Comments at 8; KMC Comments at 12-13; MCI WorldCom Comments at 39-40; NY Attorney General Comments at 30-32. Several parties also argue that *any* cap or total limit on liability unnecessarily weakens an enforcement mechanism. See, e.g., ALTS Reply at 26-27; e.spire/Net2000 Comments at 23; Intermedia Comments at 15.

<sup>1330</sup> See MCI WorldCom Comments at 39-40; MCI WorldCom Ford/Jackson Decl. at 14 (arguing that the APAP must entail liability "equal to or greater than the benefits that BA-NY would receive over time from providing such poor performance," which MCI WorldCom claims would exceed \$600 million per year); NY Attorney General Comments at 31 ("in order to effectively deter certain conduct, sanctions should be much larger than the cost to comply," which it calculates at \$495 million per year); Cable & Wireless Comments at 16. MCI WorldCom submits a detailed economic study, in which it seeks to calculate with precision the hypothetical benefits Bell Atlantic would derive from certain levels of discrimination, with the purpose of identifying a corresponding

the only means of ensuring that Bell Atlantic continues to provide nondiscriminatory service to competing carriers. In addition to the \$269 million at stake under this Plan, as noted above, Bell Atlantic faces other consequences if it fails to sustain a high level of service to competing carriers, including: federal enforcement action pursuant to section 271(d)(6); liquidated damages under 32 interconnection agreements; and remedies associated with antitrust and other legal actions.

436. Nonetheless, we recognize that the level of potential liability under a performance enforcement plan matters, as a plan with relatively low potential liability would be unlikely to provide meaningful incentives to maintain service quality levels. We believe it is useful to compare the maximum liability level to Bell Atlantic's net revenues derived from local exchange service – after all, it is primarily its local service profits that Bell Atlantic would have a theoretical incentive to “protect” by discriminating against competing local carriers.<sup>1331</sup> A “Net Return” figure developed using ARMIS data, which represents total operating revenue less operating expenses and operating taxes, is a reasonable approximation of total profits derived from local exchange service.<sup>1332</sup> In 1998, Bell Atlantic reported a Net Return of \$743 million in New York: \$269 million would represent 36% of this amount. On the basis of this comparison, we conclude that \$269 million represents a substantial percentage of Bell Atlantic's profits, and agree with the New York Commission that “the dollars at risk in the [APAP] are substantial and should deter [Bell Atlantic's] incentive to provide discriminatory service.”<sup>1333</sup>

437. We disagree with commenters who suggest that, because the Plan is divided into multiple sub-categories with the overall liability divided into corresponding “sub-caps,” Bell

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“optimal” penalty amount. The New York Commission concluded that a similar study submitted by MCI WorldCom in New York was “flawed” (*NYPSC Enforcement Plan Order* at 18) and, in this proceeding, Bell Atlantic challenges MCI WorldCom's assumptions and methodology. See Bell Atlantic Duncan Reply Decl., Attach. A. Because we do not find it necessary to determine the “optimal” penalty amount for a stand-alone enforcement mechanism, we will not specifically address the details of MCI WorldCom's study, the “flaws” identified by the New York Commission, or Bell Atlantic's counterarguments.

<sup>1331</sup> See MCI WorldCom Ford/Jackson Decl. at paras 22, 49 (suggesting that local service profits represents a meaningful frame of reference in this analysis); see also CPI Comments at 22-23; NY Attorney General Comments at 30-31. While we are using net local revenue as a reference point or yardstick for comparison purposes, we do not suggest that local revenues constitute the *only* relevant figure. We recognize that Bell Atlantic may also derive benefits in other markets (such as long distance) from retaining local market share. See New York Commission Reply, Ex. 7 at 2, n.1.

<sup>1332</sup> To arrive at a total “Net Return” figure that reflects both interstate and intrastate portions of revenue derived from local exchange service, we combined line 1915 (the interstate “Net Return” line) with a computed net intrastate return number (total intrastate operating revenues and other operating income, less operating expenses, nonoperating items and all taxes). See ARMIS 43-01 Annual Summary Report, Table 1, Cost and Revenue Table (1998).

<sup>1333</sup> *NYPSC Enforcement Plan Order* at 18, 32. The New York Commission, in its Evaluation, also expressed its “confiden[ce] that Bell Atlantic-NY, once having earned section 271 approval, has the proper incentive to continue to meet its commitments.” New York Commission Comments at 172.

Atlantic will never face sizable penalties.<sup>1334</sup> We agree that it is important to assess whether liability under an enforcement mechanism such as the APAP would actually accrue at meaningful and significant levels when performance standards are missed. Indeed, an overall liability amount would be meaningless if there is no likelihood that payments would approach this amount, even in instances of widespread performance failure. We do not believe, however, that the Plan suffers from this flaw. The New York Commission has sought to place sizable penalties on the most critical performance areas, thereby ensuring that Bell Atlantic will incur fixed, certain sanctions if its performance slips in these critical areas. In addition, the New York Commission has retained the authority to re-allocate money within the sub-categories, thereby, in its own words, “dramatically increasing [Bell Atlantic’s] incentives to maintain or improve service in particular areas.”<sup>1335</sup>

438. *Performance Measurements and Standards.* Each performance metric developed through the Carrier-to-Carrier proceeding in New York has a clearly-articulated definition, or “business rule,” which sets forth the manner in which the data is to be collected by Bell Atlantic, lists any relevant exclusions, and states the applicable performance standards. The clarity provided by these business rules will help to ensure that the reporting mechanism provides a “benchmark against which new entrants and regulators can measure performance over time to detect and correct any degradation of service rendered to new entrants.”<sup>1336</sup> While commenters raise concerns about the details of a handful of specific metrics,<sup>1337</sup> we note that many of these issues are currently being considered in the ongoing Carrier-to-Carrier proceeding in New York.<sup>1338</sup> We applaud the role played by the New York Commission in providing a forum for ongoing modification and improvement of the performance metrics.<sup>1339</sup> This is an important

<sup>1334</sup> See AT&T Comments at 89; Cable & Wireless Comments at 16; CoreComm Comments at 11; MCI WorldCom Comments at 40-42; Sprint Comments at 26. We also disagree with Sprint and find that the amount at stake under the ACCAP (\$10 million, plus up to \$15 million in penalties “unused” by the APAP) provides reasonably sizable incentive for Bell Atlantic to adhere to change management procedures developed in New York. See Sprint Comments at 31.

<sup>1335</sup> New York Commission Comments at 166; see also *NYPSC Enforcement Plan Order* at 32 (commenting that this reallocation power “allows the Commission flexibility to ensure that potential loopholes may be closed rapidly and pointedly”).

<sup>1336</sup> *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20806.

<sup>1337</sup> See AT&T Comments at 47-48; Choice One Comments at 5; AT&T Pfau/Kalb Decl. at paras 53-62; AT&T Reply at 31; CPI Reply at 13.

<sup>1338</sup> The New York Commission has explained that questions have arisen about certain performance measurements, and that several of these are currently under further review in the Carrier-to-Carrier proceeding. See New York Commission Comments at 7 n.2 and 46 n.1; *NYPSC Enforcement Plan Order* at 25-26, 30 and 39 n.4. See also Department of Justice Evaluation at 6 (recognizing that the New York Commission “is continuing its efforts to refine [certain] performance measures”).

<sup>1339</sup> The New York Commission adopted interim guidelines for inter-carrier service quality on March 16, 1998 and, in conjunction with a collaborative process involving working groups and subject-area sub-groups, has reviewed and modified these guidelines on an ongoing basis since that time. See *NYPSC Guidelines Order* at 1-2; *NYPSC Permanent Rule Order* at 1-4; *NYPSC Additional Guidelines Order* at 1-2. Moreover, the New York Commission has stated that it “fully expect[s] that metrics will continue to be developed and refined.” See New York Commission Reply at 4.

feature because it ensures that the Plan can evolve to reflect changes in the telecommunications industry and in the New York market.

439. We also believe that the scope of performance covered by the Carrier-to-Carrier metrics is sufficiently comprehensive,<sup>1340</sup> and that the New York Commission reasonably selected key competition-affecting metrics from this list for inclusion in the enforcement plan.<sup>1341</sup> We disagree with commenters who suggest that additional metrics must be added to the plan in order to ensure its effectiveness,<sup>1342</sup> and note that the New York Commission has considered and rejected similar arguments.<sup>1343</sup> Moreover, we note that the New York Commission has indicated that it will consider adding new metrics, if necessary, in the future.<sup>1344</sup> Indeed, in light of the ongoing development of xDSL-related measurements related to xDSL-capable loops in New York, we are not concerned that the APAP does not contain such measurements at present.<sup>1345</sup> The New York Commission has stated that it expects to adopt measurements addressing xDSL-capable loops once their development is complete.<sup>1346</sup> Accordingly, we expect Bell Atlantic to work with the New York Commission in developing performance measurements for xDSL-capable loops, and to incorporate these measurements into its "Carrier-to-Carrier" reports and the APAP.

440. *Structural Elements of the Plan.* We believe that the structural elements of the Plan appear reasonably designed to detect and sanction poor performance when it occurs. The APAP and the ACCAP set forth, in great detail, the processes by which Bell Atlantic's performance is measured and evaluated, the method for determining compliance and non-

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<sup>1340</sup> The New York Commission concluded that the reporting requirements "are comprehensive and will help fulfill our goal of achieving expeditiously an open, competitive local exchange market." *NYPSC Permanent Rule Order* at 3.

<sup>1341</sup> See *NYPSC Enforcement Plan Order* at 14-15. In particular, we applaud the New York Commission and Bell Atlantic for addressing the very important issue of change management by designing metrics that measure Bell Atlantic's compliance with its change management processes and give the company incentives to satisfy performance standards in this area.

<sup>1342</sup> AT&T Comments at 91; MCI WorldCom Comments at 43; AT&T Kalb/Pfau Aff. at paras. 205-206 (arguing that every Carrier-to-Carrier metric must have a penalty attached); see also Focal Comments at 7 (the mechanisms fail to address metrics relating to special access services); Sprint Comments at 30-31 (additional metrics should be added to the change control plan).

<sup>1343</sup> See *NYPSC Enforcement Plan Order* at 14-15; see also New York Commission Comments at 165.

<sup>1344</sup> See *NYPSC Enforcement Plan Order* at 15 (explaining that "[o]nce the [Performance Assurance Plan] is in effect, market conditions will be examined to determine whether metrics should be added or deleted"). The New York Commission also may add metrics to the ACCAP. See Bell Atlantic Dowell/Canny Decl., Attach. C, Ex. 2 at 3 (Amended Change Control Assurance Plan, September 1999).

<sup>1345</sup> See ALTS Comments at 37-38; AT&T Reply at 31; @link Comments at 6; Covad Comments at 33-34.

<sup>1346</sup> See New York Commission Comments at 94-95 ("[r]ecommendations to the NYPSC are expected in December for the adoption of DSL-specific metrics to ensure that [DSL services] can be separately monitored to ensure provisioning at a commercially reasonable level of quality and timeliness"); see also New York Commission Reply Comments, Ex. 7 at 4, n.2.

compliance with respect to individual metrics, and the manner in which noncompliance with individual metrics will translate into bill credits.<sup>1347</sup> Commenters have set forth a long list of specific criticisms, arguing that the Plan: unduly forgives discriminatory conduct;<sup>1348</sup> fails to deter targeted discrimination directed against individual competing carriers;<sup>1349</sup> excessively aggregates performance data and combines metrics, thereby masking unsatisfactory results;<sup>1350</sup> and does not include penalties that escalate with the severity of the performance shortfall.<sup>1351</sup> These criticisms, however, do not undermine our overall confidence that the Plan will detect and sanction poor performance when it occurs. We also find it significant that the New York Commission considered and rejected most of these arguments.<sup>1352</sup>

441. *Self-executing mechanism.* We conclude that the performance monitoring and enforcement mechanisms are reasonably self-executing.<sup>1353</sup> We recognize, however, that several commenters, as well as the Department of Justice, expressed considerable concern that the “exceptions” or “waiver” process built into the Plan could effectively destroy the self-executing aspect of the plan and open the door to extensive delay and litigation.<sup>1354</sup> We agree that a waiver process, if not narrowly limited to a discrete set of circumstances and subject to time constraints, could have such an impact. In this instance, however, we conclude that the waiver process is designed so as to alleviate the concerns noted above. First, the three grounds on which Bell Atlantic may seek a waiver review appear to be reasonable and – with one exception<sup>1355</sup> – are

<sup>1347</sup> See Bell Atlantic Dowell/Canny Decl. at paras. 122-157 and Attach. C (Petition for Approval of Amended Performance Assurance Plan); see also New York Commission Comments, Appendix 1.

<sup>1348</sup> See ALTS Comments at 78 (arguing that the “forgiveness” provision of the Plan would allow Bell Atlantic to “hide discriminatory practices”); AT&T Comments at 92-93; Intermedia Comments at 16; KMC Comments at 12; AT&T Kalb/Pfau Aff. at para. 214.

<sup>1349</sup> See MCI WorldCom Comments at 40; Intermedia Comments at 16; AT&T Pfau/Kalb Decl. at para 209.

<sup>1350</sup> See ALTS Comments at 78 (suggesting that aggregating measures together would result in “offset[ting] poor performance in one performance category with good performance in another category”); AT&T Comments at 92; KMC Comments at 12; MCI WorldCom Comments at 41-42.

<sup>1351</sup> See MCI WorldCom Comments at 42; MCI WorldCom Ford/Jackson Aff. at para. 67; AT&T Kalb/Pfau Aff. at para. 217.

<sup>1352</sup> See NYPSC Enforcement Plan Order at 12-14; see also New York Commission Reply, Ex. 7 at 3-6.

<sup>1353</sup> See NYPSC Enforcement Plan Order at 11-12. We also note with approval that the APAP “will be enforceable as a New York Commission order,” and that failure by Bell Atlantic to comply with the terms of these mechanisms could subject the company to penalties in the amount of \$100,000 per day. See New York Commission Comments at 165, n.1. Complaints alleging that Bell Atlantic is not complying with these state-crafted mechanisms thus would be directed to the New York Commission rather than the FCC.

<sup>1354</sup> See Department of Justice Evaluation at 39-40; Sprint Comments at 30; NY Attorney General Comments at 33-34; e.spire/Net2000 Comments at 23.

<sup>1355</sup> The Plan allows Bell Atlantic to seek a waiver on grounds of “unusual” or “inappropriate” CLEC behavior, listing a handful of examples. We find this category to be vague, and note that it could be used to challenge a very wide range of data. We note, however, that the New York Commission has stated that “waiver relief is intended for limited, extraordinary circumstances,” see NYPSC Enforcement Plan Order at 24, and thus we expect that this exception will not be applied expansively.

defined narrowly under the Plan. The New York Commission has explained that it will consider waiver requests only in "limited, extraordinary circumstances."<sup>1356</sup> Second, the New York Commission placed time limits on the resolution of waiver requests, which will help to ensure that the Plan functions in a timely and predictable manner.<sup>1357</sup>

442. *Data Validation and Audit Procedures.* We note with approval that the performance data used in the enforcement mechanism in New York appears to be subject to regular scrutiny. The New York Commission has independently replicated Bell Atlantic's performance reports from raw data submitted by Bell Atlantic, in order to identify and investigate any discrepancies, and will continue to do so for the next six months, and possibly longer.<sup>1358</sup> The New York Commission also will perform an annual review of Bell Atlantic's data and performance measures.<sup>1359</sup> These review and monitoring mechanisms provide reasonable assurance that the data will be reported in a consistent and reliable manner.<sup>1360</sup>

443. *Accounting Requirements.* Consistent with our accounting rules with respect to antitrust damages<sup>1361</sup> and certain other penalties paid by carriers,<sup>1362</sup> we conclude that Bell Atlantic should not be permitted to reflect any portion of market adjustments as expenses under the revenue requirement for interstate services of the Bell Atlantic incumbent LEC. Such accounting treatment ensures that ratepayers do not bear, in the form of increased rates, the cost of market

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<sup>1356</sup> NYPSC Enforcement Plan Order at 24.

<sup>1357</sup> In its order adopting the APAP, the New York Commission explained that "resolution of a waiver exception request must occur prior to the scheduled payment period." *NYPSC Enforcement Plan Order* at 24. We understand this to mean that waiver petitions will be resolved expeditiously, such that bill credits due for poor performance in a given month will never be "stayed" by a waiver petition. This interpretation is consistent with the sample waiver processing timeline contained in Bell Atlantic's petition requesting NYPSC approval of the APAP. *See* Bell Atlantic 271 Application, Attach. C, Ex. 1 (Amended Performance Assurance Plan, Appendix D at 5) (showing a hypothetical waiver petition being resolved before bill credits for a given month are due).

<sup>1358</sup> *See* New York Commission Comments at 12, 169 n.1.

<sup>1359</sup> *See id.*; Bell Atlantic Dowell/Canny Decl., Attach. C, Ex. 1 at 17-19. Bell Atlantic has also committed to implement a Quality Assurance Program (more accurately, an "Accuracy Assurance Program") under which it will document and verify its data in an open, reviewable manner and provide an internal mechanism for investigating and resolving CLEC disputes about the accuracy of reported data. *See id.* at 15.

<sup>1360</sup> MCI WorldCom has commented that this replication commitment is "extremely valuable in enabling CLECs to ensure that metrics are being reported as intended . . . after long distance entry by [Bell Atlantic]." MCI WorldCom Kinard Decl. at 3. AT&T, however, argues that this replication is incomplete. *See* AT&T Pfau/Kalb Aff. at para. 184.

<sup>1361</sup> *See Accounting for Judgments and Other Costs Associated with Litigation*, 12 FCC Rcd 5112 (1997); 47 C.F.R. § 32.7370(d). As a general matter, a carrier's operating expenses recovered through its rates must be legitimate costs of providing adequate service to ratepayers. *See, e.g., West Ohio Gas Co. v. PUC*, 294 U.S. 63, 74 (1935); *Mountain States Tel. and Tel. Co. v. FCC*, 939 F.2d 1035, 1044 (D.C. Cir. 1991).

<sup>1362</sup> Under the SBC/Ameritech merger, the Commission held that bill credits "shall not be reflected in the revenue requirement of an SBC/Ameritech incumbent LEC." *See Applications of Ameritech Corp. and SBC Communications Inc.*, CC Docket No. 98-141, Memorandum Opinion and Order, Appendix C at para. 34 (rel. Oct. 8, 1999).

adjustments under the APAP and ACCAP in the event Bell Atlantic fails to provide adequate service quality to competitive LECs. We agree with CPI that any other approach would seriously undermine the incentives meant to be created by the Plan.<sup>1363</sup> We note that the New York Commission has adopted a similar approach at the state level.<sup>1364</sup>

#### D. Other Arguments

444. We recognize that commenters raise several other concerns which, they contend, support a finding that grant of this application is not in the public interest. These arguments do not convince us that grant of this application would be inconsistent with the public interest. Several commenters offer specific allegations that Bell Atlantic has engaged in anti-competitive behavior.<sup>1365</sup> We have previously stated that we will not withhold section 271 authorization on the basis of isolated instances of allegedly unfair dealing or discrimination under the Act.<sup>1366</sup> In this instance, we do not find that the various incidents cited by commenters constitute a pattern of discriminatory conduct that undermines our confidence that Bell Atlantic's local market is open to competition and will remain so after Bell Atlantic receives interLATA authority.<sup>1367</sup> In addition, the City of New York argues that Bell Atlantic's exemption from payment of City franchise fees gives the company an unfair competitive advantage, and thus asks the Commission to require Bell Atlantic to submit to a City franchise arrangement, as a condition of section 271 approval.<sup>1368</sup> We conclude that this franchise arrangement is a matter for initial determination between the City of New York and Bell Atlantic and, therefore, we decline to address this issue in the context of this Order.

445. Finally, AT&T asserts that Bell Atlantic's provision of National Directory Assistance (NDA) service violates section 272 and "appears to violate" section 271(a).<sup>1369</sup> We note that the Common Carrier Bureau adopted an order finding that Bell Atlantic's provision of

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<sup>1363</sup> See CPI Comments at 24.

<sup>1364</sup> *NYPSC Enforcement Plan Order* at 31 ("[Bell Atlantic] will be specifically prohibited from recovering revenue losses attributable to the remedial performance credits given in connection with the [penalty plans]").

<sup>1365</sup> For example, several commenters suggest that Bell Atlantic has engaged in unfair and dilatory tactics in interconnection negotiations. See ICG Comments at 2-7; Ntegrity Comments at 2; Z-Tel Comments at 22. See also Global NAPS Comments at 2-5 (asserting that Bell Atlantic's conduct in resolving ongoing disputes concerning inter-carrier compensation for ISP-bound calls is anticompetitive); but see *Complaint of Bell Atlantic-Delaware, et al. v. Global NAPs, Inc.*, File No. E-99-22, Memorandum Opinion and Order, FCC 99-381 (rel. Dec. 2, 1999) (concluding that challenged sections of a Global NAPs tariff in Massachusetts are unlawful, based on the fact that the Massachusetts Department of Telecommunications and Energy has yet to resolve whether and how the parties' existing interconnection agreement provides for inter-carrier compensation for ISP-bound traffic).

<sup>1366</sup> See *Ameritech Michigan Order*, 12 FCC Rcd at 20749.

<sup>1367</sup> We emphasize that grant of this application *does not* reflect any conclusion that Bell Atlantic's conduct in the individual instances cited by commenters is nondiscriminatory and complies with the company's obligations under the Communications Act.

<sup>1368</sup> See City of New York Comments at 2-4.

<sup>1369</sup> AT&T Comments at 65-67.

NDA service falls within the exception for incidental, interLATA services under section 271(g)(4).<sup>1370</sup> As such, Bell Atlantic may provide this service without prior Commission authorization pursuant to section 271. In addition, the Bureau forbore from applying the separate affiliate requirements of section 272, with the exception of the nondiscrimination requirements of section 272(c)(1), to Bell Atlantic's provision of NDA service. Although it is not clear from the record whether Bell Atlantic was in compliance with the requirements of section 271(g)(4) at the time it filed its section 271 application with the Commission, we find that a temporary period of noncompliance does not warrant a finding that granting this application would not be in the public interest.<sup>1371</sup> We note that the Commission released an order (*U S WEST Forbearance Order*),<sup>1372</sup> which placed the BOCs on notice that their NDA services could be considered in-region, interLATA services, on September 27<sup>th</sup>, only two days before Bell Atlantic filed its 271 application. Moreover, since the issuance of the *U S WEST Forbearance Order*, we find that Bell Atlantic has taken prompt action to restructure its NDA service offering to comply with the Act. Given the particular circumstances present in the instant application, therefore, we find that AT&T's assertions do not provide a sufficient basis for rejecting Bell Atlantic's application.

### VIII. SECTION 271(D)(6) ENFORCEMENT AUTHORITY

446. Through section 271, Congress withheld from the BOCs, including Bell Atlantic, authority to provide in-region interLATA service until they satisfy various conditions related to competition in local markets. In this manner, Congress sought to create incentives for BOCs to cooperate with competitors and to accelerate acts facilitating the development of local competition.<sup>1373</sup> Those incentives may diminish with respect to a given state once a BOC receives authorization to provide interLATA service in that state. The record in this proceeding, for example, evidences considerable concern regarding so-called "backsliding" by Bell Atlantic once it obtains section 271 approval and begins providing in-region interLATA service in New York.<sup>1374</sup> Swift and effective post-approval enforcement of section 271's requirements thus is essential to achieve Congress's goal of maintaining conditions conducive to achieving durable competition in local markets. We describe below the post-entry enforcement framework that will govern now that Bell Atlantic has received authorization to provide interLATA service in New

<sup>1370</sup> See *Petition of Bell Atlantic for Forbearance from Section 272 Requirements in Connection with National Directory Assistance Services*, Memorandum Opinion and Order, CC Docket No. 97-172, DA 99-2990 (rel. Dec. 22, 1999).

<sup>1371</sup> This determination does not remove the possibility of future enforcement action to the extent that Bell Atlantic may have failed to comply with the Act.

<sup>1372</sup> *Petition of U S WEST Communications, Inc. for a Declaratory Ruling Regarding the Provision of National Directory Assistance*, CC Docket No. 97-172, Memorandum Opinion & Order, FCC 99-133 (rel. Sept. 27, 1999), *recon. pending* (*U S WEST Forbearance Order*).

<sup>1373</sup> *U S WEST v. FCC*, 177 F.3d 1057, 1060 (D.C. Cir. 1999). As the Department of Justice has observed, section 271 serves a critical market-opening role by "ensuring the BOC has powerful incentives (*i.e.*, the ability to enter the long distance market) to cooperate to open its markets." Department of Justice Evaluation at 38.

<sup>1374</sup> See, *e.g.*, ALTS Comments at 74-79; AT&T Comments at 81-94; Cable & Wireless Comments at 12-14; CPI Comments at 20-23; CompTel Comments at 27-34; MCI WorldCom Comments at 36-37; Sprint Comments at 23-31; NY Attorney General Comments at 27-36. See also Department of Justice Evaluation at 36-40.



York.<sup>1375</sup>

447. *The Commission's Section 271(d)(6)(A) Powers.* Congress included provisions in section 271 to ensure that a BOC continues to comply with the statutory requirements after the Commission approves an application to provide in-region interLATA service. Section 271(d)(6)(A) discusses several actions the Commission is authorized to take should it determine that a BOC "has ceased to meet any of the conditions required for such approval."<sup>1376</sup> After "notice and an opportunity for hearing," the Commission "may":

- (i) issue an order to such company to correct the deficiency;
- (ii) impose a penalty on such company pursuant to title V;<sup>1377</sup> or
- (iii) suspend or revoke such approval.<sup>1378</sup>

As the Commission previously has determined, these substantial powers augment the agency's pre-existing enforcement powers, including its authority under sections 206-209 of the Communications Act.<sup>1379</sup>

448. *Suspension of Approval to Provide InterLATA Service.* Section 271(d)(6)(A)(iii) authorizes the Commission to suspend approval to provide interLATA service in the event we determine that a BOC has ceased to meet any of the conditions required for approval. This critically important power underscores Congress's concern that BOCs continue to comply with the statute post-entry. Given this evident congressional concern, we will not hesitate to use this power – and employ it quickly – in appropriate circumstances.

449. We take this opportunity to elaborate on how we intend to implement the "suspension" power under section 271(d)(6)(A)(iii). Specifically, we envision issuing an order similar in effect to the "stand-still" order the Commission issued recently in another context involving section 271.<sup>1380</sup> Such a stand-still order would not only prohibit a non-compliant BOC

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<sup>1375</sup> Of course, this statutory framework would apply whenever a BOC receives section 271 authorization for a particular state.

<sup>1376</sup> 47 U.S.C. § 271(d)(6)(A).

<sup>1377</sup> Specifically, the Commission may impose monetary forfeitures pursuant to Title V by issuing a written notice of apparent liability for forfeiture and providing the subject an opportunity to respond in writing. 47 U.S.C. § 503(b)(4).

<sup>1378</sup> 47 U.S.C. § 271(d)(6)(A).

<sup>1379</sup> *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, 22066 (1996) (*Non-Accounting Safeguards Order*). See Bell Atlantic Application at 71 ("Any anticompetitive conduct is unthinkable in light of this Commission's powers under section 271(d)(6)(A). That provision allows the Commission to enforce the requirements of section 271 with penalties, up to and including possible revocation of long distance authority."); see also Bell Atlantic Reply at 60.

<sup>1380</sup> See *AT&T Corp. v. Ameritech Corp.*, File No. E-98-41, Memorandum Opinion and Order, 13 FCC Rcd 14508 (1998) (*Ameritech Stand-Still Order*) (stand-still order issued pursuant to 47 U.S.C. § 154(i) temporarily preventing Ameritech from enrolling additional customers in, and marketing and promoting, a "teaming" arrangement with

from enrolling additional subscribers for interLATA service, but also could prohibit the BOC from all marketing and promotion of interLATA service. This status would continue until the record is clear that the specified deficiency has been corrected for a sufficient length of time and the stand-still order is dissolved. Such an action involving Bell Atlantic in New York would thus freeze Bell Atlantic's interLATA subscriber base as of the date of the order.<sup>1381</sup>

450. Swift action in this area will further Congress's goal to ensure that markets remain open post-entry. Section 271(d)(6)(A) authorizes the Commission to suspend interLATA approval "after notice and an opportunity for hearing." The Commission previously has determined that this language does not require formal, trial-type evidentiary proceedings before an administrative law judge.<sup>1382</sup> Section 271(d)(6)(A) does not contain the requisite "*on the record* after opportunity for an agency hearing" language which triggers trial-type evidentiary hearings under sections 553 and 554 of the Administrative Procedure Act (APA).<sup>1383</sup> Nor is there any reason to believe that Congress intended section 271(d)(6) to require trial-type hearings independently of the APA.<sup>1384</sup> We thus conclude that generally we may exercise the suspension power of section 271(d)(6)(A)(iii) without holding time-consuming formal, trial-type evidentiary hearings. Rather, we envision expeditious paper proceedings.

451. With respect to this application, any diminution in performance below levels deemed sufficient in this order may expose Bell Atlantic to possible enforcement action under section 271(d)(6), including suspension of authorization to provide service. For instance, our finding of checklist compliance with respect to collocation is predicated on Bell Atlantic's demonstration that it provisions collocation within the 76-day provisioning interval established by the New York Commission 95 percent of the time. We are prepared to institute suspension proceedings in the event of a decrease in this on-time provisioning rate that we believe demonstrates that Bell Atlantic is no longer in compliance with that checklist item. Although we do not attempt to catalogue here all possible ways in which Bell Atlantic may come out of compliance, we emphasize that we view suspension as a potential remedy in any instance where other disincentives have failed to deter decreased performance by Bell Atlantic.

452. *Complaints.* In addition to FCC-initiated enforcement actions (such as forfeitures,

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Qwest Corporation pending a decision concerning the lawfulness of the program); *see also United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968) (affirming Commission's authority to impose a stand-still order pursuant to 47 U.S.C. § 154(i)).

<sup>1381</sup> Service to existing interLATA subscribers would not be interrupted. *See Ameritech Standstill Order*.

<sup>1382</sup> *See Non-Accounting Safeguards Order*, 11 FCC Rcd at 22077.

<sup>1383</sup> 5 U.S.C. §§ 553 and 554 (emphasis added). *See AT&T v. FCC*, 572 F.2d 17, 22-23 (2<sup>nd</sup> Cir.) (where statute does not require hearing "on the record," APA does not require trial-type evidentiary hearing), *cert. denied*, 439 U.S. 875 (1978); *United States v. Florida East Coast Railway Co.*, 410 U.S. 224, 234-38 (1973).

<sup>1384</sup> For example, the 90-day deadline in section 271(d)(6)(B) for resolving complaints concerning failures by a BOC to meet conditions required for approval suggests that Congress did not intend to afford BOCs trial-type hearings in all post-approval enforcement proceedings. *See Non-Accounting Safeguards Order*, 11 FCC Rcd at 22077.

suspensions, and revocations), Congress provided for the expeditious review of complaints concerning failure by a BOC to meet the conditions required for section 271 approval.<sup>1385</sup> Such complaints may include requests for damages.<sup>1386</sup> The Commission will consider and resolve those complaints alleging violations of section 271 as well as the Commission's rules and orders implementing the statute. Complaints involving a BOC's alleged noncompliance with specific commitments the BOC may have made to a state commission, or specific performance monitoring and enforcement mechanisms imposed by a state commission, should be directed to that state commission rather than the FCC.<sup>1387</sup>

453. *Conclusion.* As these statutory provisions demonstrate, obtaining section 271 authorization is not the end of the road for Bell Atlantic in New York. Congress deemed satisfaction of section 271's requirements at a single moment in time insufficient to ensure continuing competition in local markets. In order to ensure that conditions conducive to local competition in New York are not ephemeral, the statute mandates that Bell Atlantic continue to meet "the conditions required for . . . approval" of its application. Working in concert with the New York Commission, we intend to monitor closely Bell Atlantic's post-entry compliance and to enforce vigorously the provisions of section 271 using the various enforcement tools Congress provided us in the Communications Act. We require that Bell Atlantic provide us with the monthly Carrier-to-Carrier performance data reports that it provides to the New York Commission for at least one year from the date of the release of this order, so that we can review Bell Atlantic's performance to ensure continued compliance with the statutory requirements.

## IX. CONCLUSION

454. For the reasons discussed above, we grant Bell Atlantic's application for authorization under section 271 of the Act to provide in-region, interLATA services in the state of New York.

## X. ORDERING CLAUSES

455. Accordingly, IT IS ORDERED that, pursuant to sections 4(i), 4(j), and 271 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 271, Bell Atlantic New York's application to provide in-region interLATA service in the State of New York filed on September 29, 1999, IS GRANTED.

456. IT IS FURTHER ORDERED that the motion to strike filed by AT&T Corp. on November 22, 1999, IS DENIED.

457. IT IS FURTHER ORDERED that the motion to strike filed by Covad

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<sup>1385</sup> 47 U.S.C. § 271(d)(6)(B); 47 C.F.R. § 1.736; *Implementation of the Telecommunications Act of 1996, Amendment of Rules Governing Procedures to Be Followed When Formal Complaints Are Filed Against Common Carriers*, CC Docket No. 96-238, Report and Order, 12 FCC Rcd 22497, 22610-12 (1997).

<sup>1386</sup> *Non-Accounting Safeguards Order*, 11 FCC Rcd at 22066.

<sup>1387</sup> *See supra* para 441.

Communications Company on December 17, 1999, IS DENIED.

458. IT IS FURTHER ORDERED that this Order SHALL BECOME EFFECTIVE January 3, 2000.

FEDERAL COMMUNICATIONS COMMISSION

A handwritten signature in cursive script, reading "Magalie Roman Salas".

Magalie Roman Salas  
Secretary